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IN THE

Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Petitioners,

v.

THOMAS C. FULKERSON AND DOLLY S. FULKERSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

THOMAS C. NYHAN
General Counsel
JAMES P. CONDON
ROBERT A. COCO
JOHN J. FRANCZYK, JR. *
BRAD R. BERLINER
Attorneys
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. What is the proper standard for determining "trade or business" status under Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301(b)(1)?

2. Whether the Court of Appeals erred in holding that the continuous holding of a lease over many years may not be considered in determining "trade or business" status under Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301(b)(1)?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Central States, Southeast and Southwest Areas Pension Fund is a multiemployer employee benefit plan and trust and has no corporate affiliations. Petitioner Howard McDougall is one of the Trustees of the Central States, Southeast and Southwest Areas Pension Fund and has no corporate affiliations.

Respondents

Respondent Thomas C. Fulkerson is an individual and has no corporate affiliations. Respondent Dolly S. Fulkerson is an individual and has no corporate affiliations.

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OPINIONS BELOW

The January 29, 2001, opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Central States, S.E. & S.W. Areas Pension Fund v. Fulkerson*, 238 F.3d 891 (7th Cir. 2001), and is set forth in Appendix A hereto (App. A at 1a-10a).

The May 25, 2000, Memorandum Opinion and Order granting summary judgment entered by the United States District Court for the Northern District of Illinois is unreported and is set forth in Appendix B hereto (App. B at 11a-27a).

The June 8, 2000, Order denying reconsideration entered by the United States District Court for the Northern District of Illinois is unreported and is set forth in Appendix C hereto (App. C at 28a-31a).

The March 9, 2001, Order denying rehearing and rehearing *en banc* entered by the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix D hereto (App. D at 32a).

The March 23, 2001, Corrected Judgment entered by the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix E hereto (App. E at 33a).

The January 29, 2001, Judgment entered by the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix F hereto (App. F at 34a).

The June 15, 2000, Judgment entered by the United States District Court for the Northern District of Illinois is unreported and is set forth in Appendix G hereto (App. G at 35a-36a).

BASIS FOR JURISDICTION

On January 29, 2001, the Judgment of the United States Court of Appeals for the Seventh Circuit was entered. On March 9, 2001, the United States Court of Appeals for the Seventh Circuit entered an order denying rehearing and rehearing *en banc*. On March 23, 2001, the United States Court of Appeals for the Seventh Circuit entered the Corrected Judgment. This petition for writ of certiorari is filed within 90 days from the date of the entry of the Corrected Judgment as well as within 90 days of the denial of rehearing. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301(b)(1), provides:

> An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

STATEMENT OF THE CASE

Petitioners (Plaintiffs and Appellees below) Central States, Southeast and Southwest Areas Pension Fund ("Central States") and Howard McDougall, trustee, filed a complaint on January 25, 1999, to collect interim withdrawal liability payments from Respondents (Defendants and Appellants below) Thomas C. Fulkerson and Dolly S. Fulkerson, as well as from Holmes Freight Lines, Inc. ("Holmes") pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1001-1461. Jurisdiction in the district court was invoked under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(e) and 1451(c). In the complaint, Central States sought to collect all past due interim withdrawal liability payments, interest, the greater of doubled interest or liquidated damages, attorney's fees and costs.

Central States is a multiemployer pension plan within the meaning of sections 3(37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301(a)(3). Holmes is a corporation organized and existing under the laws of the State of Nebraska with its principal place of business located in the State of Nebraska. Thomas C. Fulkerson and Dolly S. Fulkerson are husband and wife who currently reside in the State of Arizona.

Holmes was subject to collective bargaining agreements executed between itself and various local unions affiliated with the International Brotherhood of Teamsters pursuant to which it was required to make contributions to Central States on behalf of certain of its employees. In 1995 Holmes began losing substantial sums of money and this trend continued through 1996, 1997 and 1998 culminating in Holmes' cessation of operations on July 17, 1998.

Central States determined that, as a result of Holmes' cessation of operations, Holmes had effected a "complete withdrawal" from Central States within the meaning of section 4203 of ERISA, 29 U.S.C. § 1383. As a result of this complete withdrawal, Holmes incurred withdrawal liability to Central States in the principal amount of $1,889,011.61. Holmes received the requisite notice and demand for payment of withdrawal liability issued by Central States which notified Holmes that it was required to discharge its liability in monthly payments of $164,877.57 commencing on October 1, 1998. Aside from a November 30, 1998, payment in the amount of $236,126.45, Holmes failed to make any of the scheduled withdrawal liability payments to Central States.

Since 1983, the stock of Holmes has been owned 68% by Thomas C. Fulkerson and 32% by Dolly S. Fulkerson. Since the date of its incorporation in 1965, Thomas C. Fulkerson has been the President of Holmes. Since at least December 31, 1982 Dolly S. Fulkerson has been the Vice-President, Secretary and a member of the Board of Directors of Holmes. As a subchapter S corporation, Holmes itself paid no income tax. Rather, Holmes' profits and losses passed through to its shareholders Thomas C. Fulkerson and Dolly S. Fulkerson. During each of the years 1983 through 1998, Thomas C. Fulkerson and/or Dolly S. Fulkerson received no less than $106,000.00 and as much as $241,000.00 as salary from Holmes. In addition, in nine of those years they received distributions from Holmes (separate from any salary or rent payments) ranging from a few thousand dollars to in excess of $1,000,000. From 1983 through 1992, Thomas C. Fulkerson and/or Dolly S. Fulkerson leased tractor trailers to Holmes and received yearly rent payments ranging from $40,800.00 to $66,300.00.

At Thomas C. Fulkerson's direction, Holmes purchased parcels of land in Portland, Oregon, Auburn, Washington, and Salt Lake City, Utah between January 1985 and January

1987. Holmes built trucking terminals on these parcels of land as a favor to and with the intention of leasing the properties to Action Express, Inc. ("Action"), an entity owned by the Fulkersons' two sons. Following construction of the trucking terminals in Portland and Auburn, those properties were sold to Thomas C. Fulkerson at Holmes' cost. The Salt Lake City property was transferred to Thomas C. Fulkerson and Dolly S. Fulkerson also at Holmes' cost.

Thomas C. Fulkerson's purchase of the Auburn terminal from Holmes was financed in part with the proceeds of a loan in the principal amount of $675,000.00 to Thomas C. Fulkerson from Prudential Federal Savings and Loan Association ("Prudential"). This loan was guaranteed by Holmes. The Fulkersons' purchase of the Salt Lake City terminal from Holmes was also financed in part with the proceeds of a loan in the principal amount of $468,800.00 to Thomas C. Fulkerson from Prudential. This loan was also guaranteed by Holmes. Holmes derived no benefit from executing these guarantees; they were executed simply as an accommodation to Thomas C. Fulkerson. In addition to guaranteeing the loans which enabled Thomas C. Fulkerson to purchase these trucking terminals, Holmes also secured in its name and paid the insurance on the terminals in Portland and Auburn after they were transferred to Thomas C. Fulkerson and also with respect to the Salt Lake City terminal after it was transferred to Thomas C. Fulkerson and Dolly S. Fulkerson.

The Portland terminal was leased to Action from May 1, 1986 through approximately August 29, 1995, at which time it was sold with the Fulkersons realizing a gain of $166,639.00. The Auburn terminal was likewise leased to Action from May 1, 1986 through approximately July 5, 1990 at which time it was sold for $925,000.00 with the Fulkersons realizing a gain of $163,676.00. The Fulkersons currently own the Salt Lake City terminal and have leased it

continuously to Action from February 10, 1986, through the present.

Holmes' purchase of the land and construction of the trucking terminals was done as a "favor" to Action (the company owned by the Fulkersons' two sons) and Holmes had no intention of making money on these transactions. Thomas C. Fulkerson negotiated the purchase of the Auburn, Portland, and Salt Lake City terminals on behalf of both himself and Holmes. Thomas C. Fulkerson negotiated and entered into written leases with Action for these same terminals. In addition, Thomas C. Fulkerson negotiated, and the Fulkersons entered into an amendment to, the lease of the Salt Lake City terminal.

For each of the years 1983 through 1998, the Fulkersons filed joint federal income tax returns upon which they reported rental payments for the terminals in Portland, Auburn, and/or Salt Lake City in amounts ranging from $66,000.00 per year to $252,000.00 per year. During this period, the Fulkersons also reported on Schedule E to their joint federal income tax returns expenses and depreciation as a set off of the income from rents received from the leases with Action as well as from the leases of the tractor trailers to Holmes. The expenses ranged from $8,555.00 to $230,257.00 per year and the depreciation from $15,251.00 to $171,192.00 per year.

The Fulkersons' sons purchased Action in 1985 for less than $1,000,000. One half of the purchase price was financed and the other half was a gift from the Fulkersons. At the time they purchased Action, the Fulkersons' sons did not have any personal money to invest in the purchase. On December 31, 1985, December 31, 1986, January 31, 1987, and August 5, 1987, Holmes gave Action unsecured loans in the amounts of $1,747,417.37, $2,400,000.00, $200,000.00 and $100,000.00, respectively. At the time that Holmes made these unsecured loans to Action, Action had attempted unsuccessfully to secure additional financing from its bank.

On September 22, 1986, Holmes executed a Subordination Agreement in favor of First Westside Bank pursuant to which it subordinated its right to receive payments from Action in repayment of its unsecured loans to Action from First Westside Bank. On May 14, 1987, Holmes and Action signed an Agreement in favor of ITT Commercial Finance Corp. ("ITT") pursuant to which they agreed to cross-collateralize their loans.

In addition to directly providing financing to Action, Holmes also guaranteed loans Action received from ITT, Citicorp Industrial Credit, Inc., and Zions Credit Corporation. Also, Holmes leased approximately 50 trailers to Action in the 1990's and Action eventually purchased these trailers from Holmes. Holmes performed "interline" work with Action and, as a result, had both accounts payable and accounts receivable with Action. Interline work is freight that is transferred from one trucking company to another trucking company en route to the freight's final destination. In March 1998, four months before Holmes' cessation of operations, Holmes granted Action a security interest in certain equipment it owned. As a result, Action was paid $268,173.85 upon Holmes' liquidation as a secured creditor. Action was eventually sold in January 1999 for $6,200,000.00.

In the district court, Central States filed a motion for summary judgment against Holmes on July 13, 1999. After briefing, the district court granted the motion on September 21, 1990. On October 15, 1999, the district court entered a judgment pursuant to Federal Rule of Civil Procedure 54(b) in favor of Central States against Holmes in the amount of $2,085,554.65. Holmes did not appeal this judgment and it is not the subject of this petition.

On April 17, 2000, Central States filed a motion for summary judgment against the Fulkersons contending that the Fulkersons' unincorporated leasing operations constituted a

"trade or business" making the Fulkersons jointly and severally liable for Holmes' withdrawal liability by virtue of ERISA's controlled group provision, 29 U.S.C. § 1301(b)(1). The district court granted the motion for summary judgment on May 25, 2000, agreeing that the leasing operations constituted a "trade or business." Subsequently, the Fulkersons filed a motion for reconsideration that was denied by the district court on June 8, 2000. On June 15, 2000, the district court entered a judgment pursuant to Federal Rule of Civil Procedure 54(b) in favor of Central States against the Fulkersons in the amount of $2,326,624.84.

On June 19, 2000, the Fulkersons filed a notice of appeal. After briefing and oral argument, the Seventh Circuit issued an opinion on January 29, 2001, reversing and remanding the case. A judgment to the same effect was entered on the same date. The Seventh Circuit held that the district court erred in relying on the holding of the leases to establish status as a trade or business. Instead, the Seventh Circuit held that only the actions of the Fulkersons, rather than the leasing itself, should be considered in determining whether the activity was continuous and regular. On March 9, 2001, the Seventh Circuit denied Central States' petition for rehearing and rehearing *en banc*. On March 23, 2001, the Seventh Circuit issued a corrected judgment.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the Seventh Circuit's decision conflicts with decisions of the Ninth Circuit in *Board of Trustees v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988), and the Eighth Circuit in *Vaughn v. Sexton*, 975 F.2d 498 (8th Cir. 1992). Further, the Seventh Circuit's decision involves the misapprehension of this Court's decision in *Commissioner v. Groetzinger*, 480 U.S. 23, 107 S. Ct. 980 (1987), and conflicts with every other lower court decision on the issue of whether leasing

constitutes a trade or business under MPPAA.[1] In *Lafrenz*, *Vaughn*, and all of the district court cases to address the issue, the courts have held that leasing constitutes a trade or business under MPPAA. These cases so held without imposing any requirement of activity beyond the leasing itself.

In the decision below, the Seventh Circuit held that not only is an unspecified level of activity required beyond the leasing activity itself, but that the activity of the leasing itself cannot even be considered in determining whether the unspecified level of activity is met. The Seventh Circuit's decision disregards MPPAA's purpose of preventing the fractionalization of assets in favor of a purported "common meaning" of the phrase "trade or business" even though this Court in *Groetzinger* held that the phrase "trade or business" does not have a common meaning. The Seventh Circuit's decision creates an enormous loophole in MPPAA by conditioning the trade or business inquiry solely upon activities beyond the leasing activity itself. This allows a lessor to fractionalize the assets of an employer so long as the lessor does not engage in physical activity beyond the leasing of the property. Such a holding puts pension funds at risk because such leasing arrangements are common (and are likely to become more common in light of the Seventh Circuit's decision) with respect to employers in industries such as the trucking industry. Further, because "trade or business" status is a prerequisite to liability under the statute, inconsistency and ambiguity in the standard to determine

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[1] Indeed, the Seventh Circuit's decision below is irreconcilable with its own prior precedent in *Central States, S.E. & S.W. Areas Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992), *Central States, S.E. & S.W. Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992), *Central States, S.E. & S.W. Areas Pension Fund v. Koder*, 969 F.2d 451 (7th Cir. 1992), and *Central States, S.E. & S.W. Areas Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992) (Posner, C.J.).

such status will cause recurring problems in future cases in resolving this threshold issue. Because the Seventh Circuit's decision conflicts with decisions of the Eighth and Ninth Circuits (as well as with all the district court cases to address this issue), and because it reflects a misapprehension of this Court's decision in *Groetzinger*, this Court should grant the petition for a writ of certiorari.

I. BACKGROUND OF MPPAA AND THE CONTROLLED GROUP PROVISION OF 29 U.S.C. § 1301(b)(1)

Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. *Connolly v. PBGC*, 475 U.S. 211, 214, 106 S. Ct. 1018, 1020 (1986). As part of ERISA, Congress established the Pension Benefit Guaranty Corporation ("PBGC") to protect the pensions of workers who were participants in failed pension funds. *Id.* However, ERISA did not obligate the PBGC to guarantee payments with respect to multiemployer plans until January 1, 1978. *Id.* During this interim period, Congress became concerned with the debilitating effect that employer withdrawals have on multiemployer plans. *Id.* at 215, 106 S. Ct. at 1021; *see generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720-25, 104 S. Ct. 2709, 2713-15 (1984); *Peick v. PBGC*, 724 F.2d 1247, 1251-56 (7th Cir. 1983). The withdrawal of an employer can have a domino effect on a multiemployer plan because the withdrawal of one employer increases the burden on the other employers in the plan in turn leading those other employers to fail. *Connolly*, 475 U.S. at 215, 106 S. Ct. at 1021; *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725, 726-27 (7th Cir. 1994). Furthermore, employers fearing this domino effect might attempt to withdraw from a multiemployer fund because of a perception of rising obligations. Of course, such perceptions become reality because the withdrawal of that employer sets off the very domino effect that the withdrawing

employer hoped to avoid. *Id.*; *Artistic Carton Co. v. Paper Indus. Union-Management Pension Fund*, 971 F.2d 1346, 1348 (7th Cir. 1992) ("[A] series of withdrawals, much like a bank run, can leave the fund unable to pay off vested obligations.") This, in turn, leads to increased taxpayer expense because the PBGC must then cover the shortfall. *See Trustees of the Chicago Truck Drivers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 827 (7th Cir. 1996). In addition, the insurance for pension plans is far from complete, and pensioners may ultimately be at risk of losing a substantial portion of their pensions even with the insurance provided by the PBGC.

As a result, Congress enacted MPPAA. MPPAA, like most other provisions of ERISA, is intended to avoid the "great personal tragedy" that occurs when pension expectations are frustrated. *Central States, S.E. & S.W. Areas Pension Fund v. Johnson*, 991 F.2d 387, 392 (7th Cir. 1993). MPPAA imposes withdrawal liability on an employer withdrawing from a multiemployer pension plan which is measured as the employer's proportionate share of the plan's unfunded vested benefits, *i.e.*, the difference between the present value of the vested benefits and the current value of the plan's assets. *Connolly*, 475 U.S. at 217, 106 S. Ct. at 1022; 29 U.S.C. §§ 1381, 1391; *see generally Milwaukee Brewery Workers' Pension Fund v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 115 S. Ct. 981 (1995) (discussing details of withdrawal liability calculation). An employer completely withdraws from a plan when it "permanently ceases to have an obligation to contribute under the plan" or when it "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a); *Central States, S.E. & S.W. Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1339 (7th Cir. 1995). Upon withdrawal, MPPAA provides a detailed dispute resolution procedure. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 196-97, 118 S. Ct.

542, 547 (1997) (discussing details of dispute resolution process); *Concrete Pipe & Prods of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S. Ct. 2264 (1993) (discussing burden of proof and standard of review in arbitration proceeding).

Reinforcing the protection afforded to pension funds is Section 4001(b)(1) of ERISA, 29 U.S.C. § 1301(b)(1). Under this section, all trades or businesses under common control are treated as a single employer for purposes of assessing and collecting withdrawal liability.[2] *Central States, S.E. & S.W. Areas Pension Fund v. Ditello*, 974 F.2d 887, 889-90 (7th Cir. 1992). As a result, all trades or businesses under common control are jointly and severally liable for withdrawal liability. *Johnson*, 991 F.2d at 388. One of the purposes of this section is to prevent a business subject to withdrawal liability from "fractionalizing its operations" or shifting assets to avoid its obligations to a pension plan. *Id.*

II. THE TRADE OR BUSINESS STANDARD

MPPAA does not provide a definition of the phrase "trade or business." *Connors v. Incoal, Inc.*, 995 F.2d 245, 250 (D.C. Cir. 1993); *Vaughn*, 975 F.2d at 502; *Personnel*, 974 F.2d at 794; *Ditello*, 974 F.2d at 889; *Lafrenz*, 837 F.2d at 894 n.6. Although the phrase "trade or business" appears in

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[2] The regulation promulgated by the PBGC to define common control, 29 C.F.R. § 4001.3, incorporates the regulations promulgated with respect to section 414(c) of the Internal Revenue Code, 26 U.S.C. § 414(c). Those regulations indicate that two entities are under common control if the same five or fewer persons own a controlling interest (defined as 80%) in each organization. 26 C.F.R. § 1.414(c)-2(c). Since the Fulkersons owned 100% of Holmes and 100% of the leasing operation, Holmes and the leasing operation are under common control. The Fulkersons did not dispute that the leasing operation was under common control with Holmes. Rather, they argued that the leasing operation did not constitute a trade or business.

many places in the Internal Revenue Code, no generally applicable definition has been created. *Personnel*, 974 F.2d at 794; *Ditello*, 974 F.2d at 890.

Despite the lack of a general definition of the phrase "trade or business" in the Internal Revenue Code, some courts have looked to this Court's *Groetzinger* decision for guidance in defining the phrase. *See Incoal*, 995 F.2d at 250-51; *Personnel*, 974 F.2d at 794. *But see Ditello*, 974 F.2d at 890 ("we think that the wisest course is to abandon the Internal Revenue Code as an interpretive tool"). In *Groetzinger*, this Court considered the meaning of the phrase "trade or business" in the context of construing the application of section 162(a) of the Internal Revenue Code, 26 U.S.C. § 162(a), to the activity of a taxpayer who was a full-time gambler. In construing the phrase, this Court stated:

> We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or amusement diversion does not qualify.

Groetzinger, 480 U.S. at 35, 107 S. Ct. at 987. However, in articulating this definition, this Court noted that although the phrase "trade or business" appears throughout the Internal Revenue Code, there is neither a definition for "general application" nor "has a broadly applicable authoritative judicial definition emerged." *Id.* at 27, 107 S. Ct. at 983. Rather, this Court expressly stated that its interpretation of the phrase "trade or business" was limited to the section of the Internal Revenue Code under review in that case and that the Court did "not purport to construe the phrase where it appears in other places [in the Internal Revenue Code]." *Id.* at 27 & n.8, 107 S. Ct. at 983 & n.8.

Prior to the Seventh Circuit's decision below, although certain courts had found the *Groetzinger* definition of trade or business helpful, none of the courts had held that the "activity" to which *Groetzinger* refers is limited to actual physical activity on the part of the owner rather than the economic activity itself. Some cases from the courts of appeals did examine physical activity, but those cases involved an activity other than leasing. *See Incoal*, 995 F.2d at 247 (holding that growing tobacco and raising cattle on a farm constitutes a trade or business); *Personnel*, 974 F.2d at 794-95 (although leasing involved, individual bought and sold more than ten properties over four year period). The other courts of appeals decisions either do not rely on *Groetzinger* or hold that the leasing itself is a trade or business. *See Vaughn*, 975 F.2d at 502-03 (treating leasing itself as activity constituting a trade or business; court did not rely on *Groetzinger*); *Lafrenz*, 837 F.2d at 894-95 (treating leasing itself as activity constituting a trade or business; court did not rely on *Groetzinger*); *Slotky*, 956 F.2d at 1374 (treating leasing itself as activity constituting a trade or business; court did not rely on *Groetzinger*); *Koder*, 969 F.2d at 453-54 (treating leasing itself as activity constituting a trade or business; court did not rely on *Groetzinger*); *Ditello*, 974 F.2d at 889-90 (treating leasing itself as activity constituting a trade or business; court specifically rejected use of *Groetzinger* test); *see also Cooper Tire & Rubber Co. Employees' Retirement Fund v. Commissioner*, 306 F.2d 20, 21 (6th Cir. 1962). (court notes distinction between mere ownership of property and activity that is inherent in leasing in holding that leasing constituted trade or business under a section of the Internal Revenue Code).

Thus, prior to the Seventh Circuit's decision below, although some courts had applied the "continuous and regular" activity standard from *Groetzinger*, no court had held that this standard precluded consideration of the

continuity and regularity of leasing itself over a number of years as satisfying this standard. Indeed, such a holding is irreconcilable with *Vaughn*, *Lafrenz*, *Cooper Tire*, and the Seventh Circuit's own prior cases in *Slotky*, *Koder*, and *Ditello* because in all of those cases the leasing itself was considered to be a trade or business independent of any additional requirement of physical activity by the owner.

In its decision below, the Seventh Circuit justified the use of the *Groetzinger* standard, and the wholesale disregard of the purpose behind the controlled group provision of preventing the fractionalization of assets, by asserting that "*Groetzinger* states the common, ordinary definition of trade or business and is thus appropriately used to interpret § 1301(b)(1)." App. A at 6a-7a n.2. However, *Groetzinger* itself states that there is neither a definition of the phrase "trade or business" nor a "broadly applicable judicial definition." 480 U.S. at 27, 107 S. Ct. at 983. Emphasizing this point, this Court cautioned that its construction of the phrase "trade or business" should not be taken out of context of the specific provisions of the Internal Revenue Code at issue in that case. *Id.* at 27 n.8, 107 S. Ct. at 983 n.8. The Seventh Circuit's decision not only claims a common meaning for the phrase "trade or business" but also applies this purported meaning not just to a different provision of the Internal Revenue Code but to an entirely different statute with an entirely different statutory purpose.[3]

Similarly, by claiming that the *Groetzinger* standard articulates the common meaning of the phrase "trade or

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[3] Nor can it be said that Congress adopted the standard articulated in *Groetzinger* (even ignoring the fact that an entirely different statute is at issue) when it enacted 29 U.S.C. § 1301(b)(1) because both ERISA and MPPAA predate *Groetzinger*. *See MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 228, 114 S. Ct. 2223, 2230 (1994) (the most relevant time to determine a statutory term's meaning is at the time it was enacted).

business" under MPPAA, the Seventh Circuit failed to consider the fact that provisions of the Internal Revenue Code that provide deductions (and hence lower tax revenue) are generally construed in a narrow manner consistent with the overall statutory purpose behind the Internal Revenue Code of ensuring tax revenue to the United States. *See United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 583, 111 S. Ct. 1512, 1519 (1991) (tax-deferral and tax-exemption provisions are construed narrowly). Thus, in interpreting the phrase "trade or business" under the Internal Revenue Code, a court would tend to construe the phrase narrowly because trade or business status confers certain deductions that might otherwise not be available. Conversely, in construing the phrase "trade or business" in light of MPPAA's broad purpose of ensuring the solvency of pension funds by preventing the fractionalization of the employer's operations and assets, a court should construe the phrase in a broad manner (or at least not construe the phrase using a narrow construction that might be appropriate for some purposes under the Internal Revenue Code).

This Court's own cases highlight the fact that the terms such as "business" or "activity" may have broader definitions than that articulated by the Seventh Circuit depending on the statutory context. For example, in *Flint v. Stone Tracy Co.*, 220 U.S. 107, 171, 31 S. Ct. 342, 357 (1911), this Court held in interpreting a corporation tax law that applied a tax on a company "engaged in business" that it was "clear" that corporations "engaged in such activities as leasing property" are engaged in business. *Id.* at 171, 31 S. Ct. at 357. This Court went on to state that one company was doing business because it "owns and leases taxicabs, and collects rent therefrom." *Id.* Also, in *Russell v. United States*, 471 U.S. 858, 105 S. Ct. 2455 (1985), this Court construed the term "activity" in the context of a statutory requirement under a federal arson statute that the activity affect interstate or

foreign commerce. The Court held that the "rental of real estate is unquestionably such an activity." *Id.* at 862, 105 S. Ct. at 2457. Notably, even in the context of a criminal statute, the Court described the leasing itself as an activity rather than requiring an inquiry into actual physical activity involved in the leasing.

The Seventh Circuit's opinion is concerned with the "prevalence of investing" and the fact that MPPAA does not automatically impose liability on shareholders who own a withdrawing employer. App. A at 8a. However, as to the latter point, section 1301(b)(1) does not impose liability on an individual shareholder because of mere ownership of the withdrawn entity, or even mere ownership of an "investment." It imposes liability on a trade or business in common control with the withdrawn entity. Leasing is not mere ownership of a piece of property. It is a continuous and regular economic activity. This Court has rejected similar attempts at characterizing an activity as "personal" based upon the consequences to the taxpayer rather than with respect to the connection that the activity has with income producing activities. *See United States v. Gilmore*, 372 U.S. 39, 48, 83 S. Ct. 623, 629 (1963) (deduction of expenses incurred for conservation of property held for production of income determined not by effect of deductibility on taxpayer but rather connection that expense has with income producing activity).

As to the former point, it is ironically another decision of the Seventh Circuit, *Slotky*, that explains why the concern with the prevalence of investing is unfounded. First, the statute requires common control. Typically, an investor will not own the requisite percentage of the ownership to put the alleged "investment" under common control with the withdrawn employer. 956 F.2d at 1374. Putting allegations of the "passive" nature of the leasing at issue to one side, this is not a situation akin to a Real Estate Investment Trust

("REIT") where there are at least one hundred investors and no five shareholders can own 50 percent or more of the outstanding voting stock. *See* 26 U.S.C. § 856 (defining a real estate investment trust). Second, the use of an individual holding title to screen assets from collection "is just the sort of device at which the controlled group provision is aimed." *Slotky*, 956 F.2d at 1374.

The Seventh Circuit also failed to consider *Groetzinger* in the context of the type of activity alleged in that case to be a trade or business. *Groetzinger* involved an individual who was a full-time gambler. Obviously, most individuals do not gamble as a trade or business. It was in this context that this Court noted that a "sporadic activity, a hobby, or an amusement diversion does not qualify" as a trade or business for purposes of the Internal Revenue Code provisions at issue in that case. 480 U.S. at 35; 107 S. Ct. at 987. Further, the distinction between an investment on the one hand and a trade or business on the other was developed to prevent taxpayers from claiming trade or business deductions in connection with holding various types of publicly traded investments that are typically the hallmark of pure investment. *See, e.g., Snyder v. Commissioner*, 295 U.S. 134, 55 S. Ct. 737 (1935) (margin trading and capital gains); *Deputy v. Du Pont*, 308 U.S. 488, 60 S. Ct. 363 (1940) (carrying charges on short sales of stock); *Higgins v. Commissioner*, 312 U.S. 212, 61 S. Ct. 475 (1941) (expenses in connection with investments in stocks and bonds). Here, however, the Fulkersons did take deductions for expenses and depreciation. Such deductions are not available to taxpayers who merely invest in stocks and bonds. *See, e.g., Higgins*, 312 U.S. at 217-18, 61 S. Ct. at 478.

Highlighting the Seventh Circuit's error in following the *Groetzinger* test without an examination of context is the fact that the terms "activity" and "trade or business" have different, and often ambiguous, meanings depending on the

section of the Internal Revenue Code at issue. For example, under 26 U.S.C. § 469(c)(1), passive activities are those activities which involve the conduct of a trade or business in which the taxpayer does not materially participate. *See Tarakci v. Commissioner*, T.C. Memo. 2000-358, 2000 WL 1727374 (T.C. Nov. 21, 2000); *Frank v. Commissioner*, T.C. Memo. 1996-177, 1996 WL 167960 (T.C. Apr. 11, 1996). Therefore, the Seventh Circuit's holding that a court must disregard the leasing itself in favor of consideration of the "activity" of the lessor founders upon the reality that even the Internal Revenue Code (for certain purposes) treats an "activity" as a trade or business even where the taxpayer does not materially participate in the "activity".

The Seventh Circuit's wholesale adoption of the *Groetzinger* test without an examination of the different context involved led the Seventh Circuit to disregard the statutory purpose behind the provision (which is typically examined when there is no plain meaning) in favor of a plain meaning that the Seventh Circuit states is contained in *Groetzinger* but which *Groetzinger* specifically disavows. By clinging to this purported "common meaning" of the phrase "trade or business," the Seventh Circuit glossed over the following undisputed facts. Holmes, the withdrawing employer, bought the properties and built truck terminals on the properties. These properties were then transferred to Thomas C. Fulkerson at cost for leasing to Action. Removing the property from Holmes and transferring it to Thomas C. Fulkerson is the paradigm case of fractionalization of assets that section 1301(b)(1) was designed to avoid. Only through the resources of Holmes was the acquisition of the property, the development of the property, and the ultimate leasing of the property possible. Holmes and the Fulkersons guaranteed loans to Action that Action could not have received from an independent business source. Action and Holmes cross-collateralized loans to each other and also conducted

significant interline business between themselves. Further, Holmes paid for the insurance on the terminals. Only by adopting a definition out of context can these facts be disregarded in determining trade or business status. Indeed, leasing is a qualitatively different activity than the fact pattern addressed by *Groetzinger* and its predecessors.

III. THE TRADE OR BUSINESS STANDARD AS IT RELATES TO LEASING

As stated above, both the Eighth Circuit in *Vaughn* and the Ninth Circuit in *Lafrenz* held that leasing itself constitutes a trade or business under MPPAA. The Seventh Circuit itself in *Slotky*, *Koder*, and *Ditello* relied on the leasing alone as an activity sufficient to constitute a trade or business.[4] Further, all other lower courts to consider the issue have found leasing itself to constitute a trade or business. *See Chicago Truck Drivers Union (Indep.) Pension Fund v. Kelly*, No. 95 C 501, 1996 WL 507258, at *9 (N.D. Ill. Sept. 4, 1996) (leasing of one property to unrelated third-party a trade or business); *Central States, S.E. & S.W. Areas Pension Fund v. Miller*, 868 F. Supp. 995, 1002-05 (N.D. Ill. 1994) (leasing one property to unrelated third-party a trade or business); *Chicago Truck Drivers Union (Indep.) Pension Fund v. Zacek Indus., Inc.*, No. 92 C 2253, 1994 WL 201042, at *1 (N.D. Ill. May 18, 1994) (leasing property to withdrawn employer constitutes trade or business); *Lyons v. Raymond Rosen & Co.*, No. 93-1514, 1994 WL 129955, at *7 (E.D. Pa. Apr. 12, 1994) (lease of one piece of real property is a trade or business); *Central States, S.E. & S.W. Areas Pension Fund v.*

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[4] In *Koder*, the individual engaged in consulting work as well as leasing operations. However, the Seventh Circuit held that the individual was engaged in "trades or businesses." 969 F.2d at 454. The use of the plural indicates that the Seventh Circuit thought more than one trade or business was involved. Thus, the leasing itself constituted a trade or business.

Landvatter, No. 89 C 5228, 1993 WL 5928, at *1-2 (N.D. Ill. Jan. 4, 1993) (triple net lease a trade or business); *Central States, S.E. & S.W. Areas Pension Fund v. Rogers*, 843 F. Supp. 1135, 1142 (E.D. Mich. 1992) (leasing to withdrawn employer constitutes trade or business); *Central States, S.E. & S.W. Areas Pension Fund v. Newbury Transp. Corp.*, No. 91 C 803, 1992 WL 37445 (N.D. Ill. Feb. 21, 1992) (leasing constitutes a trade or business); *Connors v. Hi-Heat Coal Co.*, 772 F. Supp. 1, 5-6 (D.D.C. 1991) (leasing equipment a trade or business); *ILGWU Nat'l Retirement Fund v. Minotola Indus., Inc.*, No. 88 Civ. 9131, 1991 WL 79466, at *5-6 (S.D.N.Y. May 3, 1991) (leasing of commercial property a trade or business); *Central States, S.E. & S.W. Areas Pension Fund v. Holmes*, No. 90 C 2066, 1990 WL 133498, at *1-2 (N.D. Ill. Sept. 10, 1990) (leasing land a trade or business regardless of whether an active or passive investment); *Local 478 Trucking Pension Fund v. Jayne*, 778 F. Supp. 1289, 1305 (D.N.J. 1991) (leasing constitutes trade or business even where lessee bears nearly all responsibilities under lease); *Trustees of the Amalgamated Ins. Fund v. Saltz*, 760 F. Supp. 55, 57-58 (S.D.N.Y. 1991) (net lease a trade or business even where lessor has lack of activity with respect to management and maintenance of property); *Central States, S.E. & S.W. Areas Pension Fund v. Lloyd L. Sztanyo Trust*, 693 F. Supp. 531, 536-37 (E.D. Mich. 1988) (net leasing to company under common control a trade or business); *Central States, S.E. & S.W. Areas Pension Fund v. Bay*, 684 F. Supp. 483, 485 n.6 (E.D. Mich. 1988) (sole proprietor leasing arrangement "clearly constitutes a trade or business"); *Teamsters Pension Trust Fund of Philadelphia v. Malone Realty Co.*, 82 B.R. 346, 350 (E.D. Pa. 1988) (entity which owned, leased, and paid taxes on one piece of real estate a trade or business despite argument that leasing merely a passive investment); *Central States, S.E. & S.W. Areas Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 11 (W.D. Mich. 1987) (net lease a trade or business); *Central States, S.E. & S.W. Areas*

Pension Fund v. Long, 687 F. Supp. 298, 301 (E.D. Mich. 1987) (net lease of real estate constitutes trade or business); *United Food & Comm. Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633, 638-39 (D.N.J. 1986) (net lease a trade or business); *PBGC v. Center City Motors*, 609 F. Supp. 409, 411-12 (S.D. Cal. 1984) (net lease a trade or business). This array of case law demonstrates both the prevalence of cases deciding that leasing constitutes a trade or business under MPPAA as well as the unanimity among the courts prior to the Seventh Circuit's decision in this case.

Similarly, outside of the MPPAA context, the Sixth Circuit considered leasing itself to constitute a trade or business. *Cooper Tire*, 306 F.2d at 201. The Sixth Circuit stated that "[m]ere purchase of the machinery did not produce the income. The trust had to lease the machinery, collect the rentals and make monthly payments on the bank note." *Id.* Thus, unlike the Seventh Circuit's decision below, the Sixth Circuit does consider the length of time of the leasing itself. Further, the Sixth Circuit rejected the idea that holding a lease equates with mere ownership as the Seventh Circuit held. As the Sixth Circuit states, mere purchase of property does not produce the income. Rather, the act of leasing the machinery, collecting the rentals, and making payments on the financing is distinguishable from mere ownership and rises to the level of trade or business status. *Cooper Tire*, along with *Lafrenz*, *Vaughn*, and all of the district court cases cited above recognize that leasing itself is qualitatively different from a mere investment.

The Seventh Circuit's decision below is simply irreconcilable with numerous decisions holding that leasing itself is a trade or business. The Seventh Circuit's opinion does not attempt to distinguish the wealth of authority in opposition to its reasoning. The Seventh Circuit's opinion relegates to a footnote a discussion of *Lafrenz*, indicating that the court declined to follow *Lafrenz* to the extent it might be

read to conflict with the Seventh Circuit's opinion. App. A at 7a n.3. By repeating the word "investment" as a shibboleth, the Seventh Circuit's decision fails to reconcile its decision with every other decision to come before it.

Ironically, the Seventh Circuit foreclosed the only avenue it might have possibly taken to avoid a conflict between its decision and many of the other decisions cited above addressing the leasing issue. Many of the cases cited previously involved leasing to the withdrawn employer. The Seventh Circuit might have attempted to draw a distinction on those grounds. However, the Seventh Circuit expressly reaffirmed that no economic nexus is required between the trades or businesses under common control.[5] App. A at 6a n.1. Further, the Seventh Circuit did not consider the interrelationship between Holmes, Action, and the leasing operation implicitly indicating that regardless of whether the facts demonstrated fractionalization of assets (as they clearly did here with the transfer of the terminals from Holmes to Thomas C. Fulkerson), those facts would not be considered in the trade or business inquiry. Thus, there is simply no way to distinguish the decision below from *Lafrenz*, *Vaughn*, and the host of other cases holding that the leasing itself (at least assuming that the leasing itself was continuous and regular as it was in this case) constitutes a trade or business under MPPAA.

The Seventh Circuit's disregard of the fractionalization element removes the only obstacle to the creation of a loophole that eviscerates the statutory purpose behind section 1301(b)(1). It is a common practice for owners of trucking

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[5] Other circuits are in agreement with the Seventh Circuit that no economic nexus is required. *See Incoal*, 995 F.2d at 249 ("altogether irrelevant" whether entities under common control have an economic nexus); *Lafrenz*, 837 F.2d at 895 (no requirement that entities under common control be economically related).

companies to own truck terminals and/or the trucks themselves and to lease (typically under a "net lease" or a "triple net lease") the terminals and/or trucks either to the withdrawn employer or to a third-party. Typically, even if a third-party is involved, there is an economic relationship between the third-party and the withdrawn employer, as there was in this case.

The Seventh Circuit's decision would allow all of the major assets of an enterprise, *e.g.*, terminals and trucks, to be held in a "triple net lease" shielded from liability because the owner does not physically participate in the activity. Thus, by simply letting the lessee handle many or most of the duties involved in leasing the property, the lessor can claim that he is not operating a trade or business. Because the relationship between the entities cannot be considered, and because the leasing itself (regardless of its continuity and regularity) cannot be considered, there will simply be no trade or business. However, it is extremely unlikely that an interpretation that allows such an obvious way to evade a statute would be correct. *Veazey v. Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 859 (7th Cir. 1999) (citing *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16, 102 S. Ct. 2421, 2428 (1982); *McElroy v. United States*, 455 U.S. 642, 655-56, 102 S. Ct. 1332, 1339-40 (1982); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666-67, 99 S. Ct. 2529, 2537 (1979)). Yet because the Seventh Circuit now requires activity separate and distinct from the leasing itself, and further will not consider whether the facts at issue give rise to fractionalization, this obvious way of evading the statute cannot be thwarted.[6] As the numerous cases addressing the

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[6] Although the Seventh Circuit correctly notes that such an arrangement may be disregarded under the evade or avoid provision of MPPAA, 29 U.S.C. § 1392(c), this section allows the transaction to be disregarded only if it has as a principal purpose the evading or avoiding of withdrawal liability. However, this section provides little comfort as

issue attest, the issue frequently occurs and will likely occur more frequently in the future now that the Seventh Circuit has created a conflict where none previously existed.

CONCLUSION

For the reasons stated, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

THOMAS C. NYHAN
General Counsel
JAMES P. CONDON
ROBERT A. COCO
JOHN J. FRANCZYK, JR. *
BRAD R. BERLINER
Attorneys
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Petitioners

June 7, 2001

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proving intent under section 1392(c) is notoriously difficult. *Sherwin-Williams*, 71 F.3d at 1340.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2596

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellees,

v.

THOMAS C. FULKERSON AND DOLLY S. FULKERSON,
Defendants-Appellants.

Argued Jan. 9, 2001
Decided Jan. 29, 2001

BEFORE: FLAUM, *Chief Judge*, and BAUER and COFFEY, *Circuit Judges*

FLAUM, *Chief Judge*

Defendants Thomas and Dolly Fulkerson appeal the district court's grant of summary judgment to plaintiff Central States on its claim for withdrawal liability. The Fulkersons argue that the district court erred in determining that their activities met the statutory requirements for liability. For the reasons stated herein, we reverse and remand.

I. Background

Thomas ("Tom") and Dolly are husband and wife. They are the only shareholders of Holmes Freight Lines, Inc. ("Holmes"), a trucking company that is now in bankruptcy. Tom is the President of Holmes and owns 68% of its stock, while Dolly is a 32% owner and is the Vice-President,

Secretary, and a member of the Board of Directors, though the defendants claim she has never been active in running Holmes.

In addition to managing Holmes, Tom leased a few properties. At his direction, Holmes purchased three parcels of land between January, 1985 and January, 1987. The properties were located in Portland, Oregon, Salt Lake City, Utah, and Auburn, Washington. Holmes built trucking terminals on the properties and then sold these back to Tom. Tom then leased the properties to Action Express, Inc. ("Action"). Action was another trucking company owned by the Fulkersons' sons, though Holmes and Action were always maintained as separate corporations and Tom and Dolly did not have any interest in or participate in the management of Action. Tom negotiated both the purchases of the property and the leases. These leases were "triple net leases," under which the tenant is responsible for most obligations such as maintenance, operating expenses, real estate taxes, and insurance (though Holmes may have paid the insurance premium on these properties and have been reimbursed by Tom). Thus, Tom had few obligations associated with being a traditional landlord. Tom sold the Auburn property in 1990 and the Portland property in 1995, realizing gains on both sales. The Salt Lake City property is still leased to Action. Tom has not devoted more than five hours in any year in connection with the properties, and claims that he purchased the properties for investment purposes. According to Tom, he does little more than deposit the rent checks and make mortgage payments, and reports the rental income on Schedule E of his federal income tax forms for supplemental income.

Holmes was subject to various collective bargaining agreements that required it to contribute to Central States. After Holmes ceased operations in July, 1998, it began self-liquidating and paid unsecured creditors one-quarter of the

amount they were owed. Holmes paid Central States $236,126.45, a fourth of the amount Holmes believed sufficient to cover its pension obligations. Central States, on the other hand, calculated Holmes's withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") to be $1,889,011.61. *See generally Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 803-04 (7th Cir.1999) (discussing the mechanics of withdrawal liability). The fund decided to sue the Fulkersons to recover the deficiency.

In the district court on a motion for summary judgment, Central States argued that the Fulkersons' leasing activities constituted an unincorporated trade or business under 29 U.S.C. § 1301(b)(1), which states that all "trades or businesses," whether or not they are incorporated, shall be treated as a single employer. Under this theory, because both the supposed leasing business and Holmes are under the common control of the Fulkersons, the leasing business was obligated to pay the remainder of Holmes's withdrawal liability. Since the leasing business was unincorporated, the Fulkersons became personally liable for these payments to Central States. *See Central States, Southeast and Southwest Areas Pension Fund v. Johnson*, 991 F.2d 387, 388-89 (7th Cir.1993) (describing a similar theory of liability).

The Fulkersons responded with a variety of arguments, which primarily center on the claim that they did not spend enough time engaging in leasing activities for these to constitute a "trade or business" as required by the statute. They also offered an expert witness in the real estate market who opined that the triple net leases were economically identical to passive investments such as stocks or bonds. In the alternative, they contended that Dolly had shown that she did not intend to be a partner in the alleged leasing business, and so she should not be personally liable for the withdrawal

liability even if Tom is. The district court rejected all of the Fulkersons' arguments, granted summary judgment to the fund, and ordered the Fulkersons to pay Central States the withdrawal liability plus liquidated damages, interest, and attorneys' fees, as provided in 29 U.S.C. § 1132(g)(2). The Fulkersons now appeal the district court's determinations that the leasing was a trade or business and that Dolly intended to be a partner with Tom.

II. Discussion

A. Standard of Review

The initial question presented by this case is the standard by which we review the district court's decision. The district court's interpretation of the statutory phrase "trade or business" is, of course, purely a question of law that we review *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-32, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991); *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 467 (7th Cir.2000). Summary judgments are reviewed *de novo*, viewing all of the facts, and drawing all reasonable inferences from those facts, in favor of the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1063 (7th Cir.2000).

However, Central States argues that in the circumstances of this case we review the district court's "characterizations" of undisputed historical facts, which apparently means mixed questions of law and fact, under a clearly erroneous standard of review, citing *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1373-74 (7th Cir.1992) and *Central States, Southeast and Southwest Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792 (7th Cir.1992). Central States claims that for both the trade or business issue and the partnership question the underlying facts are undisputed, the district court merely applied the law

to the facts, and the Fulkersons have no right to a jury trial. According to the fund, the satisfaction of these three conditions requires this court to deferentially review the district court's decision. The Fulkersons argue that *Slotky* and *Personnel* are unsound to the extent that these opinions contradict well-settled law of the Supreme Court and this circuit regarding review of summary judgments, and in the alternative that they are entitled to a jury trial; thus, a *de novo* standard should be applied.

We agree with the Fulkersons that our review is de novo on the trade or business question because, as explained more fully below, the district court committed a legal error in interpreting the statute. *Slotky* and *Personnel* are inapplicable for this reason. Thus, we decline the Fulkersons' invitation to partially overrule these cases.

B. Trade or Business

An employer incurs withdrawal liability for withdrawing from a multiemployer pension plan, 29 U.S.C. § 1381(a), and employer means all "trades or businesses (whether or not incorporated)" that are under common control, 29 U.S.C. § 1301(b)(1). Thus, in order to impose withdrawal liability on an organization other than the one obligated to the fund, two conditions must be satisfied: (1) the organization must be under common control with the obligated corporation; and (2) it must be a trade or business. The Fulkersons do not dispute that Tom Fulkerson controlled both Holmes and the leasing. Thus, the only question is whether Tom's leasing constitutes a trade or business.

As in all statutory interpretation cases, we begin with the statutory language. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999). Statutory terms or words will be construed according to their ordinary, common meaning unless these are defined by the statute or the statutory context requires a different definition.

See Walters v. Metropolitan Educ. Enterprises, Inc., 519 U.S. 202, 207, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997); *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). Section 1301(b)(1) presents no interpretive difficulties when it is used to impute withdrawal liability to another corporation or other formally recognized business organization that is under common control with the obligated entity. However, thorny questions can arise when informal economic activities are claimed to be a trade or business. In these circumstances, given the interpretive principles outlined above and the fact that MPPAA does not define "trades or businesses," we reaffirm that the test for what constitutes a trade or business established in *Commissioner v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 94 L.Ed.2d 25 (1987) applies in determining whether an activity is a trade or business for purposes of § 1301(b)(1).[1] *See Personnel*, 974 F.2d at 794; *see also Connors v. Incoal, Inc.*, 995 F.2d 245, 250-51 & n. 7 (D.C.Cir.1993). For an activity to be a trade or business under Groetzinger, a person must engage in the activity: (1) for the primary purpose of income or profit; and (2) with continuity and regularity. 480 U.S. at 35, 107 S.Ct. 980. While *Groetzinger* was interpreting only a specific provision in the tax code, its test comports with the common meaning of trade or business and thus can be used more generally.[2] One

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[1] We also reaffirm that no economic nexus is required between the obligated organization and trades or business under common control because the statute does not impose one. *See Personnel*, 974 F.2d at 793; *Slotky*, 956 F.2d at 1374.

[2] In *Central States, Southeast and Southwest Areas Pension Fund v. Ditello*, 974 F.2d 887, 889-90 (7th Cir.1992), we cautioned against using tax code cases to interpret MPPAA. *Ditello* noted that the phrase "trade or business" appears almost two hundred times in the tax code. *Id.* at 889. The particular meaning given to any single instance of the phrase may be shaped by the surrounding statutory context of the tax code and thus involve considerations that are absent in MPPAA. While we adhere to the idea that courts must be careful in using tax code cases to construe MPPAA because of the different context, *Groetzinger* states the common,

purpose of the *Groetzinger* test is to distinguish trades or business from investments, which are not trades or business and thus cannot form a basis for imputing withdrawal liability under § 1301(b)(1). *See Personnel*, 974 F.2d at 794.

The district court committed a legal error in determining that the second part of the trade or business test was satisfied. The district court relied only on the Fulkersons' holding of the leases alone, which they had done for over ten years, in concluding their leasing had been continuous and regular conduct; this was incorrect. Actions of a person, such as negotiating leases, researching properties, maintaining or repairing properties, etc., are business or trade conduct and thus are appropriately considered in determining whether the continuity and regularity prong of *Groetzinger* is satisfied. However, possession of a property, be it stocks, commodities, leases, or something else, without more is the hallmark of an investment. Thus, mere ownership of a property (as opposed to activities taken with regard to the property) cannot be considered in determining whether conduct is regular or continuous.[3]

Central States argues that even if the holding of the leases is not considered, Tom Fulkerson engaged in activities such as selecting the properties, negotiating purchases, and negotiating the leases. However, the Fulkersons presented evidence, including an expert witness, that the leases were an

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ordinary definition of trade or business and is thus appropriately used to interpret § 1301(b)(1).

[3] *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894-95 & n. 7 (9th Cir.1988) contains language indicating that passively holding investments might be considered a trade or business under MPPAA, though it limits its holding to the facts before it. To the extent that *Lafrenz* might be read to conflict with our decision, we decline to follow it. As stated in *Personnel* and supported by *Groetzinger*, passively holding investments without more cannot normally be considered to be a trade or business.

investment that rarely required the time or attention of the Fulkersons. Tom Fulkerson averred that he never spent more than five hours in a year dealing with the leases or the leased properties. Once the possession of the leases is removed from the equation, a reasonable factfinder could determine that the leasing activities were not sufficiently continuous and regular to constitute a trade or business.

In making this decision, we are mindful that § 1301(b)(1) was not intended to impose automatic personal liability on individuals who own companies that are required to contribute to pension funds. The plain statutory language demonstrates this by stating that only "trades or businesses" can be considered as a single employer, and we have held that shareholders generally are not responsible for withdrawal liability. *See Johnson*, 991 F.2d at 390-91; *Plumbers' Pension Fund, Local 130 v. Niedrich*, 891 F.2d 1297, 1299-1301 (7th Cir.1989). Given the prevalence of investing, permitting the holding of investments (which will normally satisfy the first prong of *Groetzinger* since the purpose is to produce income) without more to be considered regular and continuous activity would eviscerate the limitations placed in the text of § 1301(b)(1). Pension funds have statutory means to recover assets that are transferred to evade withdrawal liability, such as 29 U.S.C. § 1392(c), and must employ these rather than a personal liability mechanism not granted to them by Congress.

Central States has a couple of arguments in support of the district court's holding, though we find these unconvincing. First, it claims that Tom Fulkerson's leasing activities are virtually identical to those in *Personnel*, where the defendant was held to be responsible for the withdrawal liability. However, the defendant in *Personnel* much more frequently engaged in activities related to leasing, such as buying and selling multiple properties annually and advertising, than the Fulkersons. 974 F.2d at 794- 95. Thus, in *Personnel* the

defendant spent enough time engaged in actions related to leasing to show that his conduct was regular and continuous. In the present case, taking the facts regarding the minimal time spent on leasing activities as presented by the Fulkersons, we are unable to make such a conclusion. For example, in contrast to the numerous real estate sales and purchases the defendant in *Personnel* transacted every year, Tom Fulkerson bought only three properties and sold two over a span of more than ten years.

Second, Central States argues that "trades or businesses" should be construed broadly in accordance with MPPAA's policy to prevent the avoidance of withdrawal liability obligations by fractionalizing assets. Central States is correct that this was a policy behind MPPAA, *see, e.g.*, *Johnson*, 991 F.2d at 388, *Personnel*, 974 F.2d at 794, but knowing what the policy is tells us little about how far it should extend. MPPAA, like much other legislation, is a compromise embodying competing purposes and is intended to effectuate certain policies only to a restricted degree. *See Central States, Southeast and Southwest Areas Health and Welfare Fund v. Cullum Cos.*, 973 F.2d 1333, 1339 (7th Cir.1992) (explaining that a number of MPPAA's provisions were meant to limit the impact and application of withdrawal liability and that giving these less effect than the plain language requires would distort the statutory scheme). The only way in which we can determine the boundaries on these policies is by examining the statutory language. This explains why we have in the past rejected policy-based interpretations of MPPAA that did not find support in the text. *See Trustees of Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 830-31 (7th Cir.1996); *Johnson*, 991 F.2d at 390-91; *Cullum Cos.*, 973 F.2d at 1338-40. Congress demarcated the extent to which the anti-fractionalization policy would be pursued in the text of the MPPAA, such as by not imposing personal liability on

shareholders, as explained above. The provision imposes liability only on "trades or businesses," and those words must be given their ordinary meaning in accordance with established canons of interpretation. Under a proper construction of the language of § 1301(b)(1), a reasonable factfinder could determine that the Fulkersons' leasing activities do not constitute a trade or business.[4]

III. Conclusion

The plain meaning of MPPAA precludes considering the passive holding of property in determining whether an activity rises to the level of a trade or business. Thus, the district court committed error by relying only on the fact that the Fulkersons had held the leases for ten years in determining whether the continuity and regularity prong of *Groetzinger* was satisfied. On remand (to which Circuit Rule 36 will apply) only the actions of the Fulkersons regarding the leasing, rather than mere possession of the leases, should be considered. For the reasons stated herein, we REVERSE the decision of the district court and REMAND for further proceedings consistent with this opinion.

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[4] This court's holding that the district court erred in deciding that Tom Fulkerson's leasing is a trade or business vacates the district court's finding that Dolly was a partner of Tom in the leasing business. Thus, we need not reach the Fulkersons' argument that the district court incorrectly determined that Dolly intended to be Tom's partner.

APPENDIX B

[May 25, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 CV 420.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs,

v.

THOMAS C. FULKERSON, DOLLY S. FULKERSON, AND HOLMES FREIGHT LINES, INC.,
Defendants.

MEMORANDUM OPINION AND ORDER

HOLDERMAN, District J.

Plaintiffs Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, trustee (hereinafter referred to collectively as "plaintiffs") filed this action to collect withdrawal liability payments from defendants Holmes Freight Lines, Inc. ("Holmes"),[1] Thomas C. Fulkerson ("Thomas Fulkerson"), and Dolly S. Fulkerson ("Dolly Fulkerson") [2] pursuant to the Employee Retirement

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[1] This court entered judgment against Holmes on October 15, 1999, following the granting of plaintiffs' motion for summary judgment.

[2] The court may refer to the defendants Thomas Fulkerson and Dolly Fulkerson collectively as "defendants" in this Memorandum Opinion and Order.

Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1001 *et seq.*, Plaintiffs have filed a motion for summary judgment against defendants Thomas Fulkerson and Dolly Fulkerson, jointly and severally, for past due interim payments for withdrawal liability together with interest, liquidated damages, attorney's fees and costs. For the reasons set forth in this Memorandum Opinion and Order, plaintiffs' motion for summary judgment is GRANTED.

STATEMENT OF FACTS [3]

The following facts are undisputed. At all relevant times for purposes of this lawsuit, defendant Holmes was owned by defendants Thomas and Dolly Fulkerson, husband and wife. From April of 1983 until Holmes was liquidated, Thomas Fulkerson owned 68% of Holmes' stock and Dolly Fulkerson owned 32% of Holmes' stock. Thomas Fulkerson was the President of Holmes since its inception in 1965 and actively involved in Holmes' operations. At various times since December 31, 1982, Dolly Fulkerson held the titles of Vice President, Secretary, and Director of Holmes but was not actively involved in the operation of Holmes. Holmes was a trucking operation, which primarily hauled freight between Omaha, Nebraska and Chicago, Illinois.

In January of 1985, at the direction of Thomas Fulkerson, Holmes purchased a parcel of land in Salt Lake City, Utah and built a trucking terminal on the property. Following the construction of the trucking terminal, the property was sold to both Thomas Fulkerson and Dolly Fulkerson at Holmes' cost. The property was subsequently leased from May 1, 1986 to the present to an entity owned by the sons of defendants

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[3] The following statement of facts comes from the parties' Local Rule 56.1(a) and (b) statements of material facts and accompanying exhibits.

Thomas and DollyFulkerson, Action Express, Inc. ("Action Express"),[4] under a long-term triple net lease.

In July of 1985, at the direction of Thomas Fulkerson, Holmes also purchased a parcel of land in Portland, Oregon and built a trucking terminal on the property. Following the construction of the trucking terminal, the property was sold to Thomas Fulkerson at Holmes' cost. The property was then subsequently leased from May 1, 1986 to August 29, 1995 to Action Express also under a long-term triple net lease. Thomas Fulkerson sold the property in 1995 for a gain of $166,639.00.

Prior to January of 1987, as with the other two transactions and at the direction of Thomas Fulkerson, Holmes also purchased a parcel of land in Auburn, Washington. Once again, Holmes built a trucking terminal on the property and, following the completion of the terminal, the property was sold to Thomas Fulkerson at Holmes' cost. This trucking terminal was also leased to Action Express from May 1, 1986 until July 5, 1990 pursuant to the terms of a long-term triple net lease. In July of 1990, Thomas Fulkerson sold the property and realized a gain of approximately $163,676.00.

These three trucking terminals[5] were sold to Thomas Fulkerson and Dolly Fulkerson because they were non-

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[4] Action Express was purchased by defendants' sons Daniel and David Fulkerson in 1985. One half of the purchase price was financed by Daniel and David Fulkerson and the other half of the purchase price was given to Daniel and David Fulkerson as a gift by defendants Thomas and Dolly Fulkerson. Over the years, while Daniel and David Fulkerson owned Action Express, Holmes gave Action Express many unsecured loans. In addition, Holmes and Thomas and Dolly Fulkerson executed Guaranty Agreements on behalf of Action Express. Dolly Fulkerson also loaned Action Express money pursuant to promissory notes.

[5] Defendants argue that the only pertinent and material trucking terminal for purposes of this action is the trucking terminal located in Salt Lake City, Utah because at the time Holmes incurred the withdrawal

income properties for Holmes in the sense that the payment of rent by Action Express pursuant to the triple net lease would have only covered enough to pay the mortgage payments. Thomas Fulkerson not only negotiated the purchase of the properties on behalf of himself and Holmes, but he also negotiated and entered into the written leases between himself and Action Express. Holmes, however, secured in its name and paid the insurance on the trucking terminal properties owned by Thomas Fulkerson and Dolly Fulkerson. The insurance payments were eventually reimbursed to Holmes by defendants. Additionally, from 1984 through January 31, 1999, Holmes' Chief Financial Officer, Steve Kerns ("Kerns"), was also an officer of Action Express, holding the title of Secretary, and performed various duties for Action Express. For these duties as Secretary, Kerns never received wage payments or a salary from Action Express. Furthermore, for each of the years from 1983 to 1998, Thomas and Dolly Fulkerson filed joint federal income tax returns and deducted various expenses and depreciations against the rents they received in connection with the leasing of the trucking terminal properties to Action Express.

Holmes was subject to collective bargaining agreements executed between itself and various Local Unions affiliated with the International Brotherhood of Teamsters pursuant to which Holmes was required to make contributions to plaintiffs' pension fund on behalf of certain employees. On July 17, 1998, Holmes ceased all of its business operations and began liquidating its assets. Shortly thereafter, on July 18, 1998, plaintiff Central States Pension Fund determined that Holmes had ceased operations. As a result, Holmes effected a complete withdrawal from the Central States Pension Fund

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liability, defendants only owned the Salt Lake City, Utah trucking terminal. This court does not need to decide whether the other two terminals are material to the issues in this case, but they are certainly relevant to the issues.

because Holmes neither contributed nor was obligated to contribute to Central States Pension Fund pursuant to § 4203 of ERISA, 29 U.S.C. § 1383. Thus, Holmes incurred withdrawal liability to the Pension Fund. Holmes received a demand letter for payment of the withdrawal liability in the amount of $1,889,011.01. Holmes treated the withdrawal liability claim as an unsecured claim, and thereby, sent a check to the Central States Pension Fund in the amount of $ 236,126.45, along with a letter explaining that Holmes had ceased operation and was undergoing a voluntary liquidation. To date, plaintiffs have not received any additional money from any of the defendants. This action was filed to recoup the amount alleged owed for withdrawal liability. Plaintiffs assert that defendants leasing of truck terminals to Action Express was an unincorporated leasing operation and trade or business for purposes of ERISA and the MPPAA. Consequently, plaintiffs claim defendants Thomas and Dolly Fulkerson are liable for Holmes' withdrawal liability.

STANDARD OF REVIEW

Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1996). This court's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

A party who bears the burden of proof on a particular issue, however, may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a

genuine issue of material fact that requires trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 106 S.Ct. 2548, 2553 (1986). There is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511.

ANALYSIS

I. Leasing of Trucking Terminals Is A Trade or Business For Purposes of § 1301(b)(1) of ERISA

In 1980, Congress passed the MPPAA, amending ERISA, as an attempt to protect unfunded vested benefits of beneficiaries of multiemployer plans when employers withdraw from a multiemployer plan. *Central States, Southeast & Southwest Areas Pension Fund v. Bell Transit Co.*, 22 F.3d 706, 707 (7th Cir.1994). In other words, the MPPAA was passed in order to ensure employers would not leave a plan with vested pension obligations that were only partially funded. *Id.* Thus, an employer that withdraws from a pension plan would be held liable for the employer's share of any "unfunded vested benefits," more commonly known as "withdrawal liability." 29 U.S.C. § 1381(a), (b)(1).

Section 1301(b)(1) of ERISA also allows multiemployer plans to collect withdrawal liability from "all employees of trades or businesses (whether or not incorporated) which are under common control." 29 U.S.C. § 1301(b)(1). In essence, § 1301(b)(1) imputes an employer's withdrawal liability to all trades or businesses under the common control of the withdrawing employer. *Central States, Southeast & Southwest Areas Pension Fund v. Ditello*, 974 F.2d 2887, 889 (7th Cir.1992); *Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792 (7th Cir.1992). In this case, defendants do not contest that Holmes and their leasing of the trucking terminals were under their "common control." Rather, defendants argue that their ownership of the trucking terminals, leased to "an unrelated

third party," (Def.'s Response p. 33-34), pursuant to the terms of a triple net lease, is not a "trade or business" for purposes of § 1301(b)(1). Plaintiffs contend, however, that defendants' ownership and leasing of the trucking terminals amounted to a trade or business for purposes of § 1301(b)(1), which thereby makes each defendant jointly and severally liable for the withdrawal liability.

Unfortunately, neither ERISA nor the MPPAA defines the term "trade or business." In 1992, after different panels of judges in the Seventh Circuit addressed the question as to the proper definition and interpretation of the phrase "trade or business," what constituted a "trade or business" was not entirely clear. *Compare Central States, Southeast & Southwest Areas Pension Fund v. Ditello*, 974 F.2d 2887, 889 (7th Cir.1992), *with Central States, Southeast & Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789, 792 (7th Cir.1992); *see also Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Kelly*, No. 95 C 501, 1996 WL 507258 (N.D.Ill. Sept. 4, 1996) (providing an extensive analysis of different holdings on the issue). Yet, as this court previously noted in denying defendants' motion for summary judgment,[6] after reviewing the relevant case law, the Seventh Circuit's decision in *Personnel* is more authoritative and persuasive. Still, after a further comprehensive review of the statute, relevant case law, and recent decisions on the issue, this court remains convinced that the Seventh Circuit's decision in *Personnel* is the most authoritative and persuasive decision on the issue. *See also Central States, Southeast and Southwest Areas Pension Fund v. Neiman*, No. 99 C 1181, 2000 WL 310285 (N.D.Ill. Mar. 24, 2000) (finding the approach followed in *Personnel* authoritative and helpful); *Kelly*, 1996 WL 507258, at *4

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[6] This court denied defendants' motion for summary judgment in open court on November 5, 1999.

(same); *Central States, Southeast and Southwest Areas Pension Fund v. Miller*, 868 F.Supp. 995 (N.D.Ill.1994) (same).

In *Personnel*, the Seventh Circuit held that the definition of "trade or business" developed by the United States Supreme Court in *Commissioner of I.R.S. v. Groetzinger*, 480 U.S. 23, 107 S.Ct. 980 (1987) was "helpful in distinguishing trades or businesses from purely personal activities or investments." *Personnel*, 974 F.2d at 794. In *Groetzinger*, the Supreme Court defined "trade or business" under § 162(a) of the Internal Revenue Code and stated:

> Of course, not every income producing and profit making endeavor constitutes a trade or business. The income tax law, almost from the beginning, has distinguished between a business or trade, on the one hand, and 'transactions entered into for profit but, not connected with . . . business or trade,' on the other . . . *See* Revenue Act of 1916, § 5(a), Fifth, 39 Stat. 759. Congress 'distinguished the broad range of income or profit producing activities from those satisfying the narrow category of trade or business.' We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. Sporadic activity, a hobby, or an amusement diversion does not qualify.

Groetzinger, 480 U.S. at 35, 107 S.Ct. at 987 (*quoting Whipple v. Commissioner*, 373 U.S. 193, 197, 83 S.Ct. 1168, 1171 (1963)). Thus, under that definition, the Seventh Circuit held in *Personnel* that the defendant's real estate activities, in owning and leasing residential and commercial buildings, qualified as a trade or business. *Personnel*, 974 F.2d at 795. The Seventh Circuit noted that the real estate activities were quite substantial in that they were regular and continuous and were also designed to produce income. *Id.*

Since the *Personnel* decision, the Court of Appeals for the District of Columbia Circuit addressed the very same issue, and also found the *Personnel* decision preferable to the *Ditello* decision. *See Connors v. Incoal, Inc.*, 995 F.2d 245, 249-50 (D.C.Cir.1993). In that case, the District of Columbia Circuit held that the Supreme Court's decision in *Groetzinger* was "the most authoritative pronouncement available." *Id.* at 251. The court further declined to follow the Seventh Circuit's decision in *Ditello* because no "economic nexus" is required under the plain language of the statute. *Id.* at 249.

Consequently, following the Seventh Circuit's decision in *Personnel,* as other district court judges have, as well as the Court of Appeals for the District of Columbia's decision in *Incoal,* the law is clear that an enterprise qualifies as a "trade or business" under § 1301(b)(1) when a defendant engages in the activity with continuity and regularity and primarily for income or profit. Sporadic involvement in an activity, a hobby, or some other amusement diversion will not, however, qualify as a trade or business. Additionally, this court may consider other factors in determining whether an enterprise qualifies as a trade or business, including but not limited to: (1) the intent in creating the enterprise; (2) the tax treatment of the enterprise; and (3) the legal form of the disputed enterprise (*e.g.*, corporation, partnership, joint venture, individual owner or other). *Personnel*, 974 F.2d at 794-95; *Incoal*, 995 F.2d at 254; *Neiman*, 2000 WL 310285, at *5; *Kelly*, 1996 WL 507258, at *9; *Miller*, 868 F.Supp. at 1003.

Defendants first argue that the question of whether their enterprise of leasing the trucking terminals should qualify as a "trade or business" involves a factual dispute which requires a trial. Yet, as previously stated, the material facts in this case are undisputed. Thus, a court may properly resolve whether an enterprise qualifies as a "trade or business" on a motion for summary judgment. *Central States Pension Fund v. Slotky*, 956 F.2d 1369, 1373 (7th Cir.1992). Moreover, the

Seventh Circuit specifically stated that, while factual disputes are not normally supposed to be resolved on summary judgment, when there is no genuine issue of material fact, then a court may properly resolve the issue whether an enterprise is a "trade or business" because such a factual issue is only one of "characterization." *Personnel*, 974 F.2d at 792; *Slotky*, 956 F.2d at 1373-74.[7] The material facts before this court are entirely undisputed. Therefore, in light of the given mandate of the Seventh Circuit, this court may proceed to resolve on summary judgment the issue of whether defendants' leasing of the trucking terminal in Salt Lake City, Utah to Action Express was a trade or business.

The undisputed facts in this case establish that the defendants' leasing of the trucking terminal was a "trade or business" under established law. Defendants admit that they owned and regularly leased the Salt Lake City, Utah trucking terminal to a third-party, Action Express, for almost twelve years. In addition, defendants also leased two other trucking terminal properties to Action Express for a number of continuous years. Thus, the requirements of continuity and regularity have been met. *See Personnel*, 974 F.2d at 795 (finding that the rental of real estate is a trade or business even though the taxpayer rented a single piece of property); *Kelly*, 1996 WL 507258, *9 (holding that leasing of property

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[7] Defendants argue that this court should not resolve this issue because defendants also have a right to a jury trial on the issue whether their enterprise was a trade or business. This court, however, does not need to resolve the issue of whether defendants are entitled to a jury trial on the issue because as the Seventh Circuit noted in *Personnel*, when the facts are undisputed and the only factual issue is one of characterization, a court can properly enter summary judgment. *Personnel*, 974 F.2d at 792-96. In fact, the Seventh Circuit in *Personnel* reversed summary judgment for defendants and ordered the entry of summary judgment for plaintiffs under quite similar circumstances. *Id.* Thus, relying on *Personnel* and because the facts are undisputed here, this court is only left to resolve the factual issue as one of characterization.

over thirty years was regular and continuous); *Miller*, 868 F.Supp. at 1004-05 (concluding that ten months of rental income from leasing a residential property was sufficient to establish regular and continuous activity). Moreover, defendants' leasing operation was quite substantial.

The facts further establish that defendants leased the trucking terminal for the purpose of generating income or profit. Defendants declared the income they received from the leasing of the trucking terminal as supplemental income on their joint federal income tax returns. Additionally, defendants claimed various deductions for expenses and deprecation for several years on their joint federal income tax returns. This allowed defendants to claim less joint net income and hence reduced their joint individual tax liability. Thus, the defendants' tax treatment of the trucking terminals enterprise confirms that they operated the trucking terminals for the purpose of generating income. Therefore, similar to the defendants in *Personnel, Kelly,* and *Miller,* defendants' joint federal income tax returns sufficiently establish that they treated the trucking terminals as a "trade or business" designed to produce income. *See Personnel*, 974 F.2d at 795 (stating that deductions for real estate activities was evidence that the activities were a "trade or business); *Kelly*, 1996 WL 507258, *9 (defendant's claimed losses on federal tax return for depreciation, among other things, provided evidence that defendant treated ranch as trade or business); *Miller*, 868 F.Supp. at 1004 (defendants' deductions for all the expenses associated with their residential rental property was evidence of trade or business).

Defendants nevertheless argue that their leasing of the trucking terminal properties was not as a trade or business, but rather was really nothing more than a passive investment. Defendants claim that the use of the triple net lease only verifies that it was a passive investment. The fact that defendants used a triple net lease, however, which defendants

claim required little, if no, effort on their part to maintain the properties, does not make this case distinguishable from those cases previously cited. The mere fact that the triple net lease imposed less responsibility on the defendants in maintaining the properties they leased does not make their enterprise of leasing the properties any less of a trade or business. This is especially true in light of the fact that defendants admitted that Holmes paid the insurance on the property, which was ultimately reimbursed to Holmes by defendants.[8] Additionally, as noted above, defendants took deductions from income on their jointly filed federal income tax returns for depreciation and expenses. A passive investment, such as stocks and bonds, does not yield these same tax benefits which defendants took and are only allowed for a trade or business.

Defendants further argue that their leasing of the trucking terminal properties was not as a trade or business because, not only was their leasing of the trucking terminals entirely unrelated to the activities of Holmes, but the leases involved were to an unrelated third party. First of all, the Seventh Circuit in *Personnel* rejected the same argument as to relatedness and concluded § 1301(b)(1) does not require that the "trades or businesses" under common control be economically related. *Personnel*, 974 F.2d at 793 (*citing Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1374 (7th Cir.1992); *Western Conference of Teamsters Pension Trust Fund v. LaFrenz*, 837

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[8] Defendants' statement in their brief that they were not obligated to pay for the insurance under the triple net lease is disingenuous at best. Defendants' admitted that they ultimately paid for the insurance on the property. Thus, while under the terms of the lease, they may not have been obligated to pay for the insurance, they undoubtedly did pay for the insurance. This only further provides support for a finding that defendants ultimately conducted a trade or business by leasing the trucking terminal properties.

F.2d 892, 895 (9th Cir.1988)); *see also Incoal*, 995 F.2d at 249-50 (*quoting Personnel*, 974 F.2d at 793). Rather, the Seventh Circuit found that the only nexus required to establish withdrawal liability was the "common control" of the trade or business. *Personnel*, 974 F.2d at 793. And, as previously stated, defendants do not contest that their enterprise and Holmes were under the same common control. Second, this court does not believe Thomas and Dolly Fulkerson leased the trucking terminals to an unrelated third party. The undisputed evidence before the court establishes that defendants leased the properties to a company wholly owned and operated by their sons, David and Daniel Fulkerson, whom defendants Thomas and Dolly Fulkerson financially aided with loans and monetary gifts throughout David and Daniel Fulkerson's ownership of Action Express.

Defendants also argue that their intent in purchasing and leasing the trucking terminals is a fact question which warrants the denial of this motion for summary judgment. But, a defendant must point to objective evidence that he or she did not intend to create a business. *Incoal*, 995 F.2d at 254; *Kelly*, 1996 WL 507258, *9; *Miller*, 868 F.Supp. at 1003. In this case, defendants have failed to point to any objective evidence that they did not intend to create a trade or business as defined by the Seventh Circuit. Indeed, the objective evidence, such as Thomas and Dolly Fulkerson's annual income tax treatment of their enterprise, demonstrates a clear and continuous intent to engage in the business of leasing the truck terminals to generate income. Moreover, their enterprise was certainly more than a hobby or amusement diversion. Therefore, defendants' self-serving statement of intent is not probative of whether their enterprise is a trade or business. *Id.* Furthermore, intent is but one factor that this court can look at in determining whether defendants' enterprise constitutes a trade or business. Intent alone is not dispositive. The overwhelming evidence supports the determination that defendants' enterprise was a trade or

business under § 1301(b)(1), and defendants have failed to demonstrate there is a genuine issue of material fact on this point.

Accordingly, this court holds that the leasing of the trucking terminals to Action Express constituted a "trade or business." Applying the Seventh Circuit decision in *Personnel* and its progeny, this court finds no other conclusion is tenable. Moreover, since it is undisputed that Holmes and the trucking terminals were under defendants' "common control," Holmes and the trucking terminals are a "single employer" as defined by § 1301(b)(1). Because there is no genuine issue of material fact that the withdrawal liability was properly assessed, that defendants leasing activity was under common control with the withdrawn corporation, Holmes, and that the leasing activity constituted a trade or business, the granting of summary judgment in favor of plaintiffs is warranted and appropriate.

II. Dolly Fulkerson's Liability

Even though the undisputed material facts establish that Thomas and Dolly Fulkerson's leasing of the trucking terminals to Action Express resulted in their being liable under § 1301(b)(1), defendants additionally argue that Dolly Fulkerson should not be held liable because she did not intend to be Thomas Fulkerson's partner with respect to the leasing of the Salt Lake City trucking terminal to Action Express. Specifically, defendants assert that Dolly Fulkerson never was involved in the leasing of the properties. Defendants, however, do acknowledge that Dolly Fulkerson signed various documents including the deed to the property which evidenced her joint ownership of the Salt Lake City property with Thomas Fulkerson. Defendants also acknowledge that Dolly Fulkerson signed, in conjunction with Thomas Fulkerson, an amendment to the lease agreement between Holmes and Action Express. Plaintiffs contend that this very evidence indicates Dolly Fulkerson's intent to be in

partnership with her husband, Thomas Fulkerson, with respect to the business of leasing the terminals. Thus, plaintiffs argue that Dolly Fulkerson should be held jointly and severally liable because Dolly Fulkerson was a knowing partner with Thomas Fulkerson in the leasing of the trucking terminals.

The Seventh Circuit has consistently held that both spouses can only be liable for a trade or business's unmet pension obligations when they intended to be partners in that enterprise. *Central States Pension Fund v. Johnson*, 991 F.2d 387, 391-92 (7th Cir.1993); *see also Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Steinberg*, 32 F.3d 269 (7th Cir.1994). While "summary judgment continues to be 'notoriously inappropriate where intent is at issue,' " the Seventh Circuit reversed a summary judgment entered in favor of a defendant spouse in *Johnson* because the nonmoving party presented considerable evidence tending to show a partnership existed. Among the several facts in *Johnson* upon which the Seventh Circuit relied, were that the money used to purchase the building and semi-tractor which was leased came from the couple's joint bank accounts, that the rental income produced by the leasing activities was deposited into the couple's joint accounts, and that the couple claimed deductions from their combined gross income on their joint federal tax return based on the leasing activities. *Johnson*, 991 F.2d at 391-94. In reversing the summary judgment that had been granted to Lois Johnson by the district court, the Seventh Circuit noted that Lois Johnson relied only on a self-serving conclusory denial that she intended to form a partnership, as well as the fact that Lois Johnson failed to "exercise control" over the leasing business. *Id.* at 394. The Seventh Circuit found these facts were unrevealing in *Johnson*. *Id.*

Here, as in *Johnson*, defendants have failed to proffer evidence sufficient to create a genuine issue of material fact

on the question of whether Dolly Fulkerson intended to be a partner in the leasing enterprise. Although defendants argue their declarations are sufficient to establish Dolly Fulkerson's lack of intent, the Seventh Circuit has consistently held that "[s]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment." *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1295 (7th Cir.1993); *see also Haywood v. North Am. Van Lines, Inc.*, 121 F.3d 1066, 1071 (7th Cir.1997) ("[C]onclusory allegations and selfserving affidavits, if not supported by the record, will not preclude summary judgment."). Moreover, as noted by the Seventh Circuit regarding Lois Johnson in the *Johnson* case, the mere fact Dolly Fulkerson was not involved in the partnership enterprise to the same extent as her husband Thomas Fulkerson is unrevealing. *Johnson*, 991 F.2d at 394. Defendants readily acknowledged that the triple net leases on the trucking terminals required little, if any, effort by either of them. Also, as mentioned earlier, defendants jointly owned the property and Dolly Fulkerson signed documents with Thomas Fulkerson, such as the lease agreement amendment, to enable the enterprise to carry on its activities as both defendants jointly intended for their joint benefit. Additionally, defendants annually filed joint federal income tax returns, which claimed the proceeds from the leasing of the truck terminals as joint supplemental income and jointly claimed various deductions for expenses and depreciation arising from their joint enterprise. Therefore, based on the evidence in the record, this court finds defendants have failed to show a genuine issue of material fact exists requiring a trial on this issue. Therefore, summary judgment is warranted for plaintiffs on this issue as well. Dolly Fulkerson is jointly liable with Thomas Fulkerson for the withdrawal liability.

CONCLUSION

For the above stated reasons, plaintiffs' motion for summary judgment is GRANTED. All other pending motions are moot. The parties are strongly encouraged to reach agreement as to the monetary amount of the withdrawal liability payments, together with interest, liquidated damages, and attorneys fees and costs, if any, that should be provided, pursuant to this Order and without waiver of the issues decided here, from defendants to plaintiffs. The trial date set for June 12, 2000 is stricken. Counsel are to report on status at 10:00 a.m. on June 8, 2000.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 C 0420

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs,

v.

THOMAS C. FULKERSON, DOLLY S. FULKERSON, AND HOLMES FREIGHT LINES, INC.,
Defendants.

James F. Holderman, Judge

June 8, 2000

On May 25, 2000, this court entered an Order granting plaintiffs Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall's motion for summary judgment. In that Order, this court found defendants Thomas Fulkerson and Dolly Fulkerson engaged in a "trade or business" as the phrase is used in ERISA and thereby could be held jointly liable with Holmes Freight Lines, Inc. ("Holmes") for withdrawal liability under ERISA. Defendants move for this court to reconsider this court's Order.

This court may entertain a motion to reconsider the granting of a motion for summary judgment. As this court has repeatedly stated, however, this court's orders and

opinions are not intended to serve as mere first drafts, subject to revision and reconsideration. Thus, in making a motion to reconsider, a party may not simply reiterate arguments that the court has already rejected. A motion for reconsideration allows for a correction of a court's order in circumstances where: (1) the court has misunderstood a party, (2) the court has made a decision outside the adversarial issues presented to the court by the parties, (3) the court has made an error of apprehension (not reasoning), (4) a significant change in the law has occurred, (5) significant new facts have been discovered. *Russell v. Delco Remy Div.*, 51 F.3d 746, 747-49 (7th Cir. 1995) (*citing Bank of Waunakee v. Rochester Cheese Sales, Inc.* 906 F.2d 1185, 1191 (7th Cir. 1990)). Motions to reconsider should not be used to introduce new theories for the first time or to rehash old arguments. *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996).

Defendants' motion to reconsider largely repeats arguments on the facts and law previously considered by this court in deciding the motion for summary judgment. Defendants argue, however, that this court patently misunderstood the evidence or ignored the evidence. First of all, the court did not misunderstand the evidence nor did it ignore any of the evidence in the record. Second, after reexamining the record as a whole, in a light most favorable to defendants, this court continues to find that defendants engaged in a trade or business under ERISA such that they should be held jointly liable with Holmes for the withdrawal liability incurred. Defendants' activity was regular and continuous in that defendants regularly maintained the lease they entered into with Action Express for more than twelve years. Moreover, defendants not only had to procure and maintain insurance on the property under the terms of the lease, but they also had to pay the real estate taxes and then make a written demand to Action Express for reimbursement of the insurance and taxes. So, while defendants did not

spend a considerable amount of time in connection with maintaining the lease, the continuity and regularity of the net leases over the twelve years was sufficient under the law.

Third, while this court did not acknowledge in its Order the expert testimony of Mr. Roger Ruttenberg, who is an expert in real estate, this court did consider his testimony in ruling on the motion for summary judgment. Nevertheless, Mr. Ruttenberg's expert opinion merely stated that defendants' ownership of the Salt Lake City property and use of a net lease was analogous to a passive investment in stocks or bonds. Defendants must keep in mind, however, that this court considered all the facts and circumstances together and found that defendants engaged in a "trade or business" under ERISA. While a net lease can generally be considered a passive investment in real estate terms, after considering all the facts of this case, this court concluded that defendants' net lease was in fact more than a passive investment. As this court noted in the Order, defendants maintained several obligations under the net lease and, more notably, defendants took deductions from income on their jointly filed federal income tax returns for depreciation and expenses. A passive investment, such as in stocks and bonds, does not yield the same tax benefits as are allowed for a "trade or business." Defendants availed themselves of those tax benefits as their investment was a "trade or business." Moreover, this court correctly did not consider Mr. Ruttenberg's expert opinion that the net leases are not a "trade or business" because Mr. Ruttenberg was not tendered, nor is he even qualified, as an expert witness to provide such an opinion. Mr. Ruttenberg was tendered "to render an expert opinion regarding the economic relationship" between defendants and the net lease. Accordingly, even after an additional review of Mr. Ruttenbrg's expert opinion, this court does not find vacating this court's May 25, 2000 Order is warranted.

For these reasons, defendants' motion to reconsider the May 25, 2000 Order granting plaintiff's motion for summary judgment is DENIED.

APPENDIX D

[March 9, 2001]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2596

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellees,

v.

THOMAS C. FULKERSON AND DOLLY S. FULKERSON,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
James F. Holderman, Judge

ORDER

BEFORE: FLAUM, *Chief Judge*, and BAUER and COFFEY, *Circuit Judges*

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on February 8, 2001, by plaintiffs-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2596

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellees,

v.

THOMAS C. FULKERSON AND DOLLY S. FULKERSON,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 99 C 420, James F. Holderman, Judge

CORRECTED JUDGMENT
WITH ORAL ARGUMENT

Corrected Date: March 23, 2001

BEFORE: Honorable JOEL M. FLAUM, *Chief Judge*
Honorable WILLIAM J. BAUER, *Circuit Judge*
Honorable JOHN L. COFFEY, *Circuit Judge*

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED for further proceedings. Circuit Rule 36 will apply on remand. The above is in accordance with the decision of this court entered on January 29, 2001.

APPENDIX F

[January 29, 2001]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2596

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs-Appellees,

v.

THOMAS C. FULKERSON AND DOLLY S. FULKERSON,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 99 C 420, James F. Holderman, Judge

JUDGMENT – WITH ORAL ARGUMENT

BEFORE: FLAUM, *Chief Judge*, and BAUER and COFFEY, *Circuit Judges*

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED for further proceedings. The above is in accordance with the decision of this court entered on this date.

APPENDIX G

[June 15, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 99 C 0420

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND HOWARD MCDOUGALL, TRUSTEE,
Plaintiffs,

v.

THOMAS C. FULKERSON, DOLLY S. FULKERSON, AND HOLMES FREIGHT LINES, INC.,
Defendants.

James F. Holderman, Judge

JUDGMENT ORDER

This matter coming before the Court on a motion for summary judgment by the Plaintiffs, the Court having granted that motion in its Memorandum Opinion of May 25, 2000, and the Court being fully advised in the premises, hereby FINDS, ORDERS and ADJUDGES as follows:

A. That judgment is entered in favor of Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee, against the Defendants, Thomas C. Fulkerson and Dolly S. Fulkerson, jointly and severally, on Count I of the Amended Complaint, in the total amount of $2,326,624.84. This amount consists of $1,660,148.79 in delinquent interim

withdrawal liability payments; $221,321.72 in interest; $332,029.76 in liquidated damages, as allowed pursuant to 29 U.S.C. § 1132(g); $30,595.64 in costs for prosecuting this suit; and $82,528.93 in attorneys' fees.

B. The Court, pursuant to Federal Rule of Civil Procedure 54(b), determines that there is no just reason for delay of the entry of final judgment in favor of Plaintiffs against Defendants Thomas C. Fulkerson and Dolly S. Fulkerson on Count I of the Amended Complaint.

C. Accordingly, the Clerk of the Court is directed to enter final judgment in favor of Plaintiffs Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall, trustee, and against Defendants Thomas C. Fulkerson and Dolly S. Fulkerson, jointly and severally, in the amount of $2,326,624.84.

Supreme Court, U.S.
FILED
JUL 5 2001
CLERK

No. 00-1824

In The
Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and HOWARD McDOUGALL, Trustee,

Petitioners,

v.

THOMAS C. FULKERSON and DOLLY S. FULKERSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

FREDERIC R. KLEIN,
Counsel of Record
DEBORAH RZASNICKI HOGAN
GOLDBERG, KOHN, BELL, BLACK, ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603
(312) 201-4000

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly decide, viewing all of the evidence in the light most favorable to Respondents, and drawing all reasonable inferences in their favor, that Respondents presented sufficient evidence from which a rational factfinder could conclude that Respondents' ownership of property leased under a long-term triple net lease was not a "trade or business"?

2. Given the procedural posture of the case, its fact-specific nature, the Seventh Circuit's adherence to long-standing Supreme Court precedent, and the absence of any actual circuit court conflict, is this an appropriate case for the exercise by this Court of its certiorari jurisdiction?

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STATEMENT OF THE CASE

Respondents present their own Statement of the Case because Petitioners selectively argue irrelevant facts, and ignore most of the facts in the District Court record which were centrally relevant to the Court of Appeals' decision. Moreover, Petitioners fail to discuss a number of procedural issues which the Court would wish to consider in deciding whether this case is ripe for certiorari review. Set forth below is a more complete account of the procedural history and the record facts of this case.

I. The District Court Proceedings

On January 25, 1999, Petitioners filed this action under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1001-1461 (collectively, "ERISA"). In part, that statute provides that an employer who withdraws from a multiemployer pension plan is subject to "withdrawal liability" in an amount equal to its proportionate share of "unfunded vested benefits."

Petitioners brought suit against Holmes Freight Lines, Inc. ("Holmes"), the withdrawing employer. They also sued Thomas C. Fulkerson ("Tom") and Dolly S. Fulkerson ("Dolly") (collectively, the "Fulkersons") based on a provision of ERISA that all "trades or businesses . . . under common control shall be treated as . . . a single employer" which are jointly and severally liable for any withdrawal liability incurred by any one member of the controlled group. 29 U.S.C. § 1301(b)(1) ("Section

1301(b)(1)"). Petitioners alleged that the Fulkersons' ownership of real property in Salt Lake City (the "Property"), leased pursuant to the terms of a long-term triple net lease, was a "trade or business," thereby subjecting the Fulkersons to personal liability for the alleged withdrawal liability incurred by Holmes.

On March 23, 1999, the Fulkersons answered the complaint and demanded a trial by jury. On April 18, 2000, after extensive discovery including 19 depositions and two conflicting experts' reports, Petitioners filed a motion for summary judgment on the "trade or business" issue. On the same day, Petitioners moved to strike the Fulkersons' jury demand. On May 25, 2000, without deciding the jury issue, and just 18 days before trial, the District Court granted Petitioners' motion for summary judgment. On June 2, 2000, the Fulkersons filed a motion for reconsideration, which was denied on June 8, 2000. On June 15, 2000, the District Court entered final judgment against the Fulkersons in the amount of $2,326,624.84, which forced the Fulkersons into bankruptcy.

The Fulkersons filed their Notice of Appeal on June 19, 2000, and their petition for relief in the United States Bankruptcy Court for the District of Arizona on June 27, 2000. On July 20, 2000, the Bankruptcy Court granted the Fulkersons relief from the automatic stay and permission to pursue an appeal to the United States Court of Appeals for the Seventh Circuit.

II. The Fulkersons' Appeal

On appeal, the Fulkersons argued that in granting summary judgment to Petitioners, the District Court erred in failing to interpret the phrase "trade or business" in accordance with the plain meaning of the statute. The Fulkersons further argued that the District Court committed reversible error by making several material procedural mistakes. For instance, the District Court ignored all of the relevant and admissible facts in the record favorable to the Fulkersons (including, among many other things, the testimony of their expert witness). The District Court misapplied the Seventh Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1373 (7th Cir. 1992), under which a District Court purportedly may "characterize" facts on summary judgment only if the facts are not in dispute, and there has been no jury demand. At the beginning of the case the Fulkersons demanded a trial by jury which Petitioners moved to strike just before trial, but the District Court expressly refused to decide whether the Fulkersons were entitled to a jury trial.

The Fulkersons explained to the Court of Appeals that the following record evidence was ignored by the District Court, and firmly established that summary judgment was improper:

(a) On average, Tom spent no more than five hours per year in connection with his ownership of the Property depositing a rent check once a month, and writing another check once a month to pay the mortgage.

(b) From the time of Holmes' incorporation in 1965 until it closed its doors 33 years later,

Tom was always the full-time President, spending 2,000 hours per year working for the company.

(c) Tom's "business" was Holmes.

(d) Tom made a passive investment in the Property as a retirement vehicle.

(e) Tom only visited the Property once, 15 years ago, before the terminal was built.

(f) Tom always reported the rental income from the Property on Schedule E, the schedule for "supplemental income," of the tax returns he filed with the Internal Revenue Service. Tom did not report that rental income on Schedule C, the schedule for "trade or business" income.

(g) Dolly did not sign either the original lease for the Property or the current lease.

(h) Tom and Dolly always had separate checking and savings accounts.

(i) All rent checks received from the Property were payable only to Tom, and not to Tom and Dolly.

(j) Tom deposited the rent checks in his personal bank account, and not into a joint account.

(k) Tom used money from his own personal account to purchase the Property, and to pay the mortgage.

(l) Dolly did not share in any of the profits or losses incurred with respect to the Property.

The Fulkersons also argued that the District Court improperly ignored, and later rejected, the testimony of

their expert witness. That testimony established that the economics of a passive stock or bond investment are directly analogous to the economics of Tom's long-term triple net lease of the Property. The District Court initially failed to consider this expert testimony, and on reconsideration rejected it, even though Petitioners never moved to exclude the testimony, and the District Court never engaged in the analysis required by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

III. The Ruling Of The Court Of Appeals

On January 29, 2001, after considering the extensive summary judgment record, the briefs of the parties, oral argument, and all relevant case law, the Court of Appeals (per Chief Judge Flaum) held that the District Court improperly granted summary judgment to Petitioners, and remanded for further proceedings consistent with its opinion. *Central States, Southeast and Southwest Areas Pension Fund v. Fulkerson*, 238 F.3d 891 (7th Cir. 2001). In so doing, the Seventh Circuit noted that the District Court never decided the jury issue, and that because of its ruling with respect to Tom, the Court of Appeals did not need to reach the separate issues pertaining to Dolly. 238 F.3d at 894, 897 n.4.

On February 9, 2001, Petitioners filed their Petition For Rehearing with Suggestion for Rehearing En Banc. No judge in active service requested a vote with respect to the suggestion for rehearing en banc, and all judges on the original panel voted to deny rehearing. Accordingly, on March 9, 2001, the Petition for Rehearing was

denied. Ninety days later, the Petitioners filed their petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Yet Ripe For Review By This Court Because The Seventh Circuit Reversed And Remanded For Further Proceedings.

This is a summary judgment case that, in light of the factual record, has been reversed and remanded by the Court of Appeals for further proceedings consistent with its opinion. There are a number of unresolved issues which the District Court must address on remand including, but not limited to, the following: (a) the admissibility of the Fulkersons' expert witness testimony under *Daubert* and *Kumho Tire* if Petitioners move to strike that testimony (notwithstanding the Court of Appeals' reliance thereon); (b) the Fulkersons' right to a trial by jury under, among other cases, *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *Lorillard v. Pons*, 434 U.S. 575 (1978); and *Sheet Metal Workers Local 19 v. Keystone Heating and Air Conditioning*, 934 F.2d 35 (3d Cir. 1991); and (c) Dolly's intent to be Tom's partner in any alleged "trade or business" under, among other cases, *Chicago Truck Drivers, Helpers and Warehouse Union (Independent) Pension Fund v. Steinberg*, 32 F.3d 269 (7th Cir. 1994).

Accordingly, this case is not yet ripe for certiorari review. *See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court.") *See also Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari

because the case had been remanded by the Court of Appeals for further proceedings and, therefore, did not present the type of final judgment generally awaited by the Court before it will exercise its certiorari jurisdiction). A decision to grant the petition for a writ of certiorari will not, under any circumstances, resolve all of the issues in this case.

II. This Is A Fact-Specific Case About Whether, Based Upon The Entire Record, A Rational Factfinder Could Conclude That Tom's Triple Net Lease Was Not A "Trade Or Business" And/Or That Dolly Did Not Intend To Be Tom's Partner.

This summary judgment case involves a determination of whether the Fulkersons presented sufficient evidence from which a rational factfinder could conclude that Tom's triple net lease is not a "trade or business," and that Dolly did not intend to be Tom's partner. These are highly fact-specific issues which can be resolved only after a thorough review of the extensive evidentiary record in this case – including more than a dozen deposition transcripts; sworn declarations of the Fulkersons, their expert witness, and others; and documentary evidence. The Court of Appeals has already reviewed the record in light of the standards set forth in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) and, unlike the District Court, considered all of the evidence presented by both sides. That record and that standard compelled the Court of Appeals to reverse and remand for further proceedings.

Due to the procedural posture of this case, the nature of the inquiry, and the unique facts presented (e.g., Tom did not spend more than five hours a year in connection with the Property; Tom's business was to run Holmes; this triple net lease was equivalent to a passive investment in a stock or bond; Tom and Dolly always had separate checking and savings accounts; and Dolly did not share in the profits and losses from the Property), a decision by this Court would necessarily be fact-specific. Such cases are ill-suited for review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."); *Houston Oil Co. of Texas v. Goodrich*, 245 U.S. 440 (1918) (writ of certiorari dismissed as improvidently granted where primary issue was whether there was sufficient evidence in the record for a rational jury to find in favor of petitioners).

III. The Seventh Circuit's Decision Follows This Court's Well-Established "Plain Meaning" Jurisprudence, And Does Not "Misapprehend" Any Decision Of This Court.

The Court of Appeals' decision is in accordance with the well-established "plain meaning" jurisprudence of this Court. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well.") (citation omitted); *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 206 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary,

contemporary, common meaning.' "); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("The ordinary and obvious meaning of [a] phrase is not to be lightly discounted."); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

Notably, these "plain meaning" principles have been applied by this Court to the very statutory scheme at issue in this case. *Hughes*, 525 U.S. at 438 (interpreting provisions of ERISA in accordance with plain meaning of words used). Following the precedent of this Court, therefore, the Court of Appeals held that the phrase "trade or business" in Section 1301(b)(1) should be interpreted in accordance with the plain meaning of the words used. *Fulkerson*, 238 F.3d at 895 (citing *Hughes* and other "plain meaning" decisions of this Court). Curiously absent from the petition for a writ of certiorari is any mention of *Hughes* and this line of Supreme Court precedent, which are the foundation of the Seventh Circuit's decision.

Instead of acknowledging this Court's "plain meaning" jurisprudence and the Court of Appeals' faithful reliance thereon, Petitioners argue that the Seventh Circuit's decision "misapprehends" *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23 (1987), *aff'g* 771 F.2d 269 (7th Cir. 1985). That is not the case. Instead, the Seventh Circuit reaffirmed in *Fulkerson* its earlier decision in *Central States, Southeast and Southwest Areas Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992) (a case won by these same Petitioners). Following *Personnel*, the Court of Appeals held that the *Groetzinger* analysis is

appropriate to determine the "trade or business" question under Section 1301(b)(1), because *Groetzinger* "comports with the common meaning of trade or business and thus can be used more generally." *Fulkerson*, 238 F.3d at 895.

This is not a "misapprehension" of Supreme Court precedent. To the contrary, *Groetzinger* specifically stated that the decision was based upon "what [the Court] regards as a common sense concept of what is a trade or business." 480 U.S. at 35. Thus, the Seventh Circuit has faithfully followed the jurisprudence of this Court.

IV. There Is No Circuit Court Conflict.

Like the Seventh Circuit in *Personnel*, and now *Fulkerson*, *Conners v. Incoal, Inc.*, 995 F.2d 245, 250-51 (D.C. Cir. 1993), also held that *Groetzinger* sets forth the appropriate test for determining whether an investment is a "trade or business" for purposes of Section 1301(b)(1). Instead of acknowledging the agreement between the Seventh Circuit and the D.C. Circuit on this issue, Petitioners allege a conflict between the Seventh Circuit and older cases from the Eighth and Ninth Circuits. There is, however, no actual conflict.

In *Bd. of Trustees of the Western Conference of Teamsters Pension Fund v. LaFrenz*, 837 F.2d 892 (9th Cir. 1988), the Ninth Circuit did not discuss the "plain meaning" jurisprudence of this Court or *Groetzinger*, which had been decided the previous year. Instead, after engaging in "an essentially factual inquiry," and in a holding limited to "the facts in this case," *LaFrenz* held, with virtually no statutory analysis, that leasing certain equipment was a "trade or business" under Section 1301(b)(1). 837 F.2d at

894, nn. 6 & 7. *Fulkerson* and *LaFrenz* do not constitute an actual circuit split where both cases were decided based upon their particular and very different fact patterns.

Similarly, in *Vaughn v. Sexton*, 975 F.2d 498 (8th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993), the Eighth Circuit held after a "factual inquiry" that a particular lease of real property was a "trade or business." In reaching this result, *Vaughn v. Sexton* rejected the defendants' arguments on the facts that their activities "were not continuous or regular enough to amount to the acts of a trade or business." 975 F.2d at 502, 503. In applying *Groetzinger*'s "continuous and regular" analysis to the particular facts at issue (although without citing *Groetzinger* itself), *Vaughn v. Sexton* is in accord with the D.C. Circuit's decision in *Conners v. Incoal*, and the Seventh Circuit's decisions in *Personnel* and *Fulkerson*. Petitioners may privately understand this because they did not cite *Vaughn v. Sexton* in either the District Court or the Court of Appeals.

There simply is no genuine circuit split.

CONCLUSION

In light of the factual record, the procedural posture of the case, the Court of Appeals' faithful adherence to long-standing Supreme Court precedent, and the absence of any actual circuit court conflict, there is no persuasive reason for this Court to grant review. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDERIC R. KLEIN,
Counsel of Record
DEBORAH RZASNICKI HOGAN
GOLDBERG, KOHN, BELL, BLACK,
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603
(312) 201-4000

Counsel for Respondents

(3)

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IN THE

Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Petitioners,

v.

THOMAS C. FULKERSON AND DOLLY S. FULKERSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY MEMORANDUM

THOMAS C. NYHAN
General Counsel
JAMES P. CONDON
ROBERT A. COCO
JOHN J. FRANCZYK, JR. *
BRAD R. BERLINER
Attorneys
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REASONS FOR GRANTING THE WRIT

I. THIS CASE IS RIPE FOR REVIEW.

Respondents assert that this case is not yet ripe for review because there are other issues in the case that may require resolution on remand. Contrary to Respondents' assertion, this Court has granted petitions for a writ of certiorari notwithstanding the fact that a court of appeals had remanded the case to a district court. Further, this Court grants petitions for a writ of certiorari to resolve legal questions worthy of review not, as Respondents assert, to resolve all of the issues in a particular case.

The Petition for a Writ of Certiorari (the "Petition") seeks review of two legal questions. First, the Petition requests that this Court resolve the question of the appropriate standard for determining status as a "trade or business" under 29 U.S.C. § 1301(b)(1). Second, the Petition requests that this Court resolve the question of whether the holding of a lease over many years can be considered in determining "trade or business" status under 29 U.S.C. § 1301(b)(1). The Seventh Circuit's determination of these legal questions will not be affected by the proceedings on remand. This Court has on numerous occasions granted a petition for a writ of certiorari where the court of appeals has remanded the case. *See, e.g.*, *Seling v. Young*, 531 U.S. 250, ___, 121 S. Ct. 727, 733 (2001) (Court granted certiorari in case that had been remanded by the Ninth Circuit for an evidentiary hearing); *Whitman v. American Trucking Ass'n*, 531 U.S. 457, ___, 121 S. Ct. 903, 907 (2001) (Court granted certiorari in case that had been remanded by the District of Columbia Circuit to EPA). Further, this Court has on numerous occasions granted certiorari where the resolution of the questions presented would not resolve the entire case. *See, e.g.*, *Glover v. United States*, 531 U.S. 198, 205, 121 S. Ct. 696, 701 (2001) (court of appeals to address on remand issues outside of questions presented in petition).

The cases cited by Respondents are not to the contrary. In *Brotherhood of Locomotive Fireman & Engineermen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 88 S. Ct. 437 (1967) (*per curiam*), this Court held that a case was not yet ripe for review because it had been remanded by the court of appeals to the district court for a determination as to whether a contempt had, in fact, occurred. In that case, the proceedings on remand might have had an effect on the questions presented because a finding of no contempt on remand would moot the questions presented. Similarly, in *Virginia Military Institute v. United States*, 508 U.S. 946, 113 S. Ct. 2431 (1993) (Scalia, J.), the proceedings on remand were to determine an appropriate remedy and the choice of remedy might have had a bearing on the questions presented.

Here, in contrast, the proceedings on remand will not have an effect on the questions presented. The determination of the legal question as to the appropriate standard for determining "trade or business" status has already been made. Further, the Seventh Circuit has already made the determination that the continuous holding of a lease over a number of years cannot be considered as a matter of law in determining "trade or business" status. Therefore, the case is ripe for review because neither question presented will be affected by the proceedings on remand.

II. THE QUESTIONS PRESENTED IN THE PETITION ARE QUESTIONS OF LAW NOT DEPENDENT UPON THE PARTICULAR FACTS OF THIS CASE.

Respondents contend that review of this case is unwarranted because of the allegedly fact specific nature of this case. However, resolution of the legal questions presented by the Petition is not limited to the particular fact pattern at issue in this case. The first question presented asks this Court to determine the appropriate standard for determining "trade or

business" status under 29 U.S.C. § 1301(b)(1). This standard will apply to *every* "trade or business" determination made under the statute.

The second question asks this Court to determine whether the continuous holding of a lease over a number of years may be considered in determining "trade or business" status. As the numerous cases cited on pages 20 through 22 of the Petition attest, this is a recurring legal issue of applicability to *all* cases involving leases in the "trade or business" context. The Seventh Circuit did not hold, as Respondents would imply, that the holding of a lease *under these particular facts* could not be considered as a matter of law in determining whether conduct is "continuous and regular" (and so, in the Seventh Circuit's view, constitutes a "trade or business"). Rather, the Seventh Circuit held that the holding of a lease could *never* be considered in making the "continuous and regular" determination. Thus, contrary to Respondents assertion, the resolution of these legal questions will have a broad impact well beyond this particular case.

III. THE SEVENTH CIRCUIT'S RELIANCE ON *GROETZINGER* AS PROVIDING THE PLAIN MEANING OF "TRADE OR BUSINESS" IS MISPLACED.

Respondents contend that the Seventh Circuit relied on this Court's well-established plain meaning jurisprudence in determining the meaning of "trade or business" in 29 U.S.C. § 1301(b)(1). However, Petitioners never contended that the Seventh Circuit should have disregarded the alleged plain meaning of 29 U.S.C. §1301(b)(1). Rather, Petitioners contend that the Seventh Circuit erred in holding that "trade or business" has a plain meaning.

In support of its determination that "trade or business" has a plain meaning, the Seventh Circuit relied upon this Court's decision in *Commissioner v. Groetzinger*, 480 U.S. 23, 107

S. Ct. 980 (1987). However, as discussed in detail in the Petition at pages 14 through 15, *Groetzinger* acknowledged that there is no definition of the phrase "trade or business" nor a broadly applicable judicial definition. Further, *Groetzinger* cautioned that the standard articulated in that case should not be taken out of context of the particular section of the Internal Revenue Code involved in that case.

Instead of first determining whether the application of *Groetzinger*'s "trade or business" was appropriate outside of the particular context of that case, the Seventh Circuit instead first determined that *Groetzinger*'s standard provided the plain meaning of "trade or business" for all contexts (despite *Groetzinger*'s counsel to the contrary). Once the Seventh Circuit held that the *Groetzinger* standard provided the plain meaning of "trade or business," the Seventh Circuit was free to disregard the purpose behind the statute of preventing the fractionalization of assets of the withdrawn employer. As the Seventh Circuit stated:

> Central States is correct that [preventing fractionalization] was a policy behind MPPAA, but knowing what the policy is tells us little about how far it should extend. MPPAA, like much other legislation, is a compromise embodying competing purposes and is intended to effectuate certain policies only to a restricted degree. The only way in which we can determine the boundaries on these policies is by examining the statutory language. This explains why we have in the past rejected policy-based interpretations of MPPAA that did not find support in the text. Congress demarcated the extent to which the anti-fractionalization policy would be pursued in the text of the MPPAA, such as by not imposing personal liability on shareholders, as explained above. The provision imposes liability only on "trades or businesses," and those words must be given their ordinary meaning in accordance with established canons of interpretation.

Central States, S.E. & S.W. Areas Pension Fund v. Fulkerson, 238 F.3d 891, 896-97 (7th Cir. 2001). The Seventh Circuit may be correct that it is difficult to determine how far the statutory policy should extend. However, it is not difficult to determine that it should extend to the situation where truck terminals owned by the withdrawing employer are transferred (*i.e.*, fractionalized) to the owners of the withdrawing employer for leasing. Only by claiming that the phrase "trade or business" has a plain meaning (when it does not) can the obvious fractionalization at issue in this case be disregarded.

Ironically, the Seventh Circuit did not hesitate to consider the *lack* of fractionalization in a case decided subsequent to the filing of the Petition. *Central States, S.E. & S.W. Areas Pension Fund v. White*, No. 00-2812, 2001 WL 818782 (7th Cir. July 20, 2001). In comparing the *White* case to the *Fulkerson* case, the Seventh Circuit had this to say:

> In nearly every way, the Whites' conduct resembles that of the Fulkersons, from the manner of depositing rent checks to the tax treatment of the rental income and expenses. While the Whites performed *more* upkeep, such as maintaining the property and performing routine repairs and cleaning, *this involvement is not legally significant*. . . . The Whites' activities, *however extensive*, in the upkeep and maintenance of their investment in their primary residence were personal in nature, and as such, do not rise to the level of a trade or business.

Id. at *6 (emphases added). Thus, despite the fact that the Whites' engaged in more activity than the Fulkersons, the Seventh Circuit held that the activities in renting garage apartments did not amount to a "trade or business" as a matter of law.

The Seventh Circuit went on to explain its reasoning in a way that makes it clear that, even within the Seventh Circuit itself, there is a conflict in the standard being applied to determinations of "trade or business" status:

> Our conclusion that the Whites' rental activity does not amount to a trade or business *furthers Congress' purpose* in enacting the statute. "Congress enacted sec. 1301(b) in order to prevent businesses from shirking their ERISA obligations by fractionalizing operations into many separate entities . . . ." Here, the Whites' rental activity has absolutely no possibility of being used to dissipate or fractionalize Jones Transfer's corporate assets and thus avoid withdrawal liability. . . . A law with the *sound purpose of preventing fractionalization* should not be stretched to such an extreme application that would expose a common owner of a completely unrelated personal business to such withdrawal liability. The Whites' two apartments *did not offend Congress' purpose* designed to prevent businesses from shirking their ERISA obligations. . . .

Id. at *6 (quoting *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1013 (9th Cir. 1987)) (citations omitted) (emphases added).

In this case, the Seventh Circuit relied on the level of activity, and not fractionalization, in making the "trade or business" determination. However, in *White*, the Seventh Circuit held that it was the lack of fractionalization that mattered despite the fact that the level of activity in *White* was greater than the level of activity in this case. These two holdings are contradictory. Either the statute's anti-fractionalization purpose must be considered in making the "trade or business" determination (meaning that the Court erred here in disregarding the fractionalization in favor of the alleged plain meaning of "trade or business") or the purpose cannot be considered (meaning that the activities in *White* were at least sufficient for a factfinder to conclude that they amounted to a "trade or business").

IV. THERE IS A CIRCUIT CONFLICT REGARDING THE "TRADE OR BUSINESS" STANDARD.

Respondents contend that the District of Columbia Circuit's decision in *Connors v. Incoal, Inc.*, 995 F.2d 245 (D.C. Cir. 1993), is in agreement with the Seventh Circuit in applying the *Groetzinger* test. Although in *Connors* the District of Columbia Circuit used the *Groetzinger* test, *Connors* did not involve leasing. Further, there is a conflict between the Seventh Circuit and the District of Columbia Circuit. Although the Seventh Circuit acknowledged in *Central States, S.E. & S.W. Areas Pension Fund v. White*, No. 00-2812, 2001 WL 818782 (7th Cir. July 20, 2001), that no economic nexus is required for a "trade or business" to be under common control, 2001 WL 818782, at *3, the Seventh Circuit went on to require an economic nexus *sub silentio.* That is, the Seventh Circuit stated that a "completely *unrelated*" business should not be exposed to withdrawal liability. 2001 WL 818782, at *6 (emphasis added). To the extent *White* requires that there be some economic relationship beyond common control, *White* conflicts with the District of Columbia Circuit's decision in *Connors* wherein the District of Columbia Circuit held that "there is *no* economic nexus requirement that an enterprise must meet in order to qualify as a 'trade or business.' Indeed, it is not even *relevant*, let alone dispositive, that there is, or is not, an economic nexus . . . ." *Id.* at 254 (emphases in original). Similarly, the Seventh Circuit states in this case that no economic nexus is required. However, there is simply no way to distinguish this case from the Seventh Circuit's decisions in *Central States, S.E. & S.W. Areas Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992), *Central States, S.E. & S.W. Areas Pension Fund v. Koder*, 969 F.2d 451 (7th Cir. 1992), and *Central States, S.E. & S.W. Areas Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992), wherein the Seventh Circuit found that leasing itself constituted a "trade or business" without imposing *any* additional activity require-

ment beyond the leasing itself. The only distinction between this case and *Slotky*, *Koder*, and *Ditello*, is that in those cases the property was leased to the withdrawn employer, not another party. Thus, the Seventh Circuit seems to be imposing an economic nexus requirement *sub silentio* or at the very least considering the economic relationship relevant. This is in direct conflict with the District of Columbia Circuit which held that an economic nexus, or lack thereof, is not even relevant. *Connors*, 995 F.2d at 254.

Additionally, Respondents contend that there is no conflict between the Seventh Circuit's decision in this case and the Ninth Circuit's decision in *Board of Trustees of the Western Conference of Teamsters Pension Fund v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988), because the Ninth Circuit in *Lafrenz* did not follow *Groetzinger* in holding that leasing equipment was a "trade or business" despite the argument in that case that the leasing amounted to a "passive investment." Actually, the fact that the Ninth Circuit in *Lafrenz* did *not* follow *Groetzinger* highlights the conflict between the Seventh Circuit and the Ninth Circuit. In *Lafrenz*, the Ninth Circuit explained that the statute at issue was enacted to prevent fractionalization. *Id.* at 894. Because the leased trucks in that case were used as part of the operations of the withdrawn employer, the Ninth Circuit held that the leasing constituted a "trade or business" notwithstanding the fact that the Lafrenzs' contended that the leasing was a "passive investment." *Id.* at 894-95. Here, the Seventh Circuit did not consider the fact that the terminals at issue were built by the withdrawn employer and transferred (fractionalized) to the Fulkersons in making the "trade or business" determination. The fact that the Respondents disagree with the holding in *Lafrenz* does not eliminate the conflict between *Lafrenz* and the Seventh Circuit's holding in this case.

Lastly, Respondents contend that the Eighth Circuit's decision in *Vaughn v. Sexton*, 975 F.2d 498 (8th Cir. 1992), does not conflict with the Seventh Circuit's decision in this case

because, according to Respondents, the Eighth Circuit applied the *Groetzinger* analysis. Although the Eighth Circuit in *Vaughn* did mention "continuous and regular" in the case, the mention was made in the context of explaining the defendants' argument in that case. *See Vaughn*, 975 F.2d at 503 ("defendants also argue that its income-generating activities were not continuous and regular enough to amount to the acts of a trade or business"). The Eighth Circuit did not state that it was adopting "continuous and regular" as the appropriate test nor did it cite to *Groetzinger*. Instead, the Eighth Circuit stated:

> The cases interpreting the meaning of "trade or business" under ERISA have held the following fact patterns to have established the existence of a trade or business liable under the law: vehicle leasing operations conducted for profit; vehicle and real property leases between two entities under common control; and the subsistence of one commonly controlled entity, directly or indirectly, partly or entirely, upon the revenues generated by a second commonly controlled entity. In this case, it is undisputed that the trust, established in 1980, had leased real property in 1986 and 1987 to [the withdrawn entity]. Without addressing the question of when those activities occurred, the trial court held that such undisputed facts established the existence of a trade or business for ERISA purposes. If the question of the timing of the trust's activities is not a consideration, we agree with that legal conclusion.

Id. at 503. Thus, contrary to Respondents' assertion, the Eighth Circuit did consider whether the facts amounted to fractionalization and did not look to any actual physical activity beyond the fact that the trust leased real property to the withdrawn employer over a period of two years. This is in direct conflict with the Seventh Circuit's approach in this case which did not consider the fractionalization involved and held that the leasing itself could not be considered as a matter of law.

The split in the circuits warrants review by this Court. The differing and confusing standards applied by the circuit courts makes it impossible to determine what constitutes a "trade or business" under 29 U.S.C. § 1301(b)(1). This, in turn, engenders continuing litigation because as fiduciaries under ERISA, pension plan trustees have a duty to collect all withdrawal liability due to the plan. In the absence of controlling guidance by this Court, fiduciaries will be compelled to litigate the issue. Further, persons and entities that may be subject to withdrawal liability are unclear as to the scope of activity that may constitute a "trade or business." Under these circumstances, a clear statement from this Court is required concerning the standard for determining what constitutes a "trade or business" under MPPAA.

CONCLUSION

For the reasons stated herein and in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

THOMAS C. NYHAN
General Counsel
JAMES P. CONDON
ROBERT A. COCO
JOHN J. FRANCZYK, JR. *
BRAD R. BERLINER
Attorneys
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION FUND
9377 West Higgins Road
Rosemont, IL 60018-4938
(847) 518-9800

* Counsel of Record

Attorneys for Petitioners